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FIRST DEAN OF THE SCHOOL

**By his Wife and Daughter**

**A. M. BOARDMAN and ELLEN D. WILLIAMS**



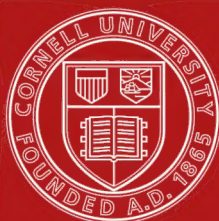
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A TREATISE  
ON  
THE LAW OF  
ROADS AND STREETS

BY  
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## PREFACE.

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WE know from our own experience that such a book as this is needed, for many branches of the subject are not treated in any modern work, nor, indeed, are they fully treated in any work. Great changes have been wrought in the law of roads and streets not only by statutes and by judicial decisions, but also by the inherent power of progress and improvement. Written constitutions have made radical changes in many particulars, and these changes have been far reaching, so far, indeed, that there are yet questions almost untouched by the adjudged cases. We have endeavored to note these changes, to group and array the decisions, and to state the law as it exists.

It has been our purpose to make a book that shall be practically useful, and to that end our labors have been directed. We have dealt with general principles and not with statutes, except as they were incidentally involved in our discussions. Upon many branches of the subject we have found the law far from settled notwithstanding the fact that the subject of highways is a very ancient one. We have freely stated our opinions upon many doubtful and unsettled questions. If our opinions are found to be erroneous, as some of them may be, our errors, when discovered and corrected, will serve to set the true rules in a clearer light, and to that extent we shall have done some good, even if we have erred. Upon many points we have

found conflict, and, where we have found this, we have brought together the conflicting cases, not, however, always yielding our adherence to the side supported by the greater number of cases, but often giving it to that side, which, as we believe, "hath the better reason."

BYRON K. ELLIOTT.

WILLIAM F. ELLIOTT.

*Indianapolis, July, 1890.*



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# ROADS AND STREETS.

## CHAPTER I.

### PUBLIC ROADS.

Ways are either public or private. A way open to all the people is a highway.<sup>1</sup> The term highway is the generic name for all kinds of public ways,<sup>2</sup> including county and township roads, streets and alleys, turnpikes and plank roads, railroads and tramways, bridges and ferries, canals and navigable rivers. In short, every public thoroughfare is a highway.<sup>3</sup> But every highway need not be a thoroughfare, as it is now well settled that a *cul-de-sac* may be a highway.<sup>4</sup> It is the purpose of this

<sup>1</sup> Woolrych on Ways, 3; *People v. Jackson*, 7 Mich. 432; *Peck v. Smith*, 1 Conn. 103; *Stackpole v. Healy*, 16 Mass. 33; *Davis v. Smith*, 130 Mass. 113; *Makepeace v. Worden*, 1 N. H. 16; *Cool v. Crommet*, 1 Shep. 250; *State v. Wilkinson*, 2 Vt. 480; *Davis et al. v. Mayor*, 14 N. Y. op. 515, 516; *Blackstone v. Co. of Worcester*, 108 Mass. 68. See, also, *State v. Proctor*, 90 Mo. 334.

<sup>2</sup> 2 Shearm. & Redf. on Neg. (4th ed.), § 333; *Mobile, etc., Co. v. Davis*, (Ill.) 22 N. E. Rep. 850, 851.

<sup>3</sup> *Regina v. Saintiff*, 6 Mod. 255; *Allen v. Ormond*, 8 East, 4; *Rex v. Lloyd*, 1 Campb. 260; 3 Kent Comm. \*432; *Union Pacific R. R. v. Comm'rs*, 4 Neb. 456.

<sup>4</sup> *Bateman v. Bluck*, 14 Eng. Law & See, also, *Schatz v. Pfiel*, 56 Wis. 429.

Eq. 69; *Rugby Charity v. Merryweather*, 11 East, 375; *Reg. v. Burney*, 31 L. T. (U. S.) 828; *People v. Kingman*, 24 N. Y. 559; *Townsend v. Saunders*, 26 Hun. (N. Y.) 308; *People v. Alstyne et al.*, 42 N. Y. (Keys) 35; *Bartlett v. City of Bangor*, 67 Me. 460; *Sheafe v. People*, 87 Ill. 189, S. C. 29 Am. Rep. 49; *Adams v. Harrington*, 114 Ind. 66. For a time a contrary doctrine obtained. *Woodyer v. Hadden*, 5 Taunt. 125; *Wood v. Veal*, 5 B. & Ald. 454; *Holdane v. Cold Springs*, 23 Barb. 103. A *cul-de-sac*, while it may be a highway, is not necessarily one, as this must depend on the facts in the particular case. *State v. Frazier*, 28 Ind. 196; *Bateman v. Bluck*, *supra*.

work to treat only of such highways as are known as roads and streets.

A way is, in legal contemplation, a highway, whether it be one owned by a private corporation or be one owned by the government, or a governmental corporation, and whether it be situated in a town or in the country, if it be one over which the public have a general right of passage. No matter whether established by prescription, or by dedication, or under the right of eminent domain, it is a highway if there is a general right to use it for travel. The mode of its creation does not of itself invariably determine its character, for this, in general, is determined by the rights which the public have in it.<sup>1</sup>

In order that a way may be considered a public one it is not necessary that it should be of such dimensions as to make it suitable for use by horsemen and vehicles, unless the statute so provides. Where the statute declares what shall constitute a highway it governs, and a way not answering to the requirements of the statute can not be rightfully regarded as a highway. In the absence of a statute, a way may be public although it is suitable for passage only by footmen.<sup>2</sup> It was, it seems, anciently considered that a way along which cattle might be driven was a "driftway" and not properly a highway,<sup>3</sup> but this doctrine, if it ever was authoritatively declared, has long since been exploded, for cattle may lawfully be driven along a highway, the only limitation being that care and diligence shall be used to prevent injury to private property adjoining the way.<sup>4</sup> In a broad sense, piers, public squares, and the like, may be re-

<sup>1</sup> *Makepeace v. Worden*, 1 N. H. 16; *Peck v. Smith*, 1 Conn. 103; *Stackpole v. Healy*, 16 Mass. 33; *State v. Proctor*, 90 Mo. 334; *Kennedy v. Williams*, 87 N. C. 6; *People v. Loeftel*, 102 N. Y. 1; *Washington, etc., Co. v. Lacey*, 103 Ind. 48; *Pittsburgh, etc., Co. v. Com.*, 104 Pa. St. 583; *Com. v. Wilkinson*, 16 Pick. 175; *Lewis v. R. R. Co.*, 3 S. W. Rep. (Ky.) 107; *Baltimore, etc., Co. v. Routzahn*, 65 Md. 113.

<sup>2</sup> *Rex v. County of Salop*, 13 East, 95; *Rex v. Lyon*, 3 Dow. & R. 497. See, also, *Boston, etc., R. R. Co. v. Boston*, 140 Mass. 87.

<sup>3</sup> It was, indeed, the ancient rule that a way which did not lead to a market town was not a highway. 1 *Hawkins P. C.*, c. 76, section 1.

<sup>4</sup> *Ballard v. Tyson*, 1 Taunt. 285; *Goodwyn v. Chevely*, 4 H. & N. 631.

garded as highways,<sup>1</sup> but we employ the term highways in a more restricted sense.

A private way may, doubtless, be transformed into a public one, but in order that this may result it must appear that the owner fully consented to the change, or there must be some element of estoppel to deprive him of his rights as the owner of the fee. Where a way is laid out and used as a private way, the mere fact that the public also makes use of it without objection from the owner will not make it a public way. If the use by the public is not clearly declaratory of the right to use it as a highway, and is not so understood by the owner of the fee, the public will not acquire the free right of passage, nor will it be burdened with the duty of making it safe and convenient for passage.<sup>2</sup> The common law went very far in sustaining the private right in an easement transformed from a private way into a public one. An English writer says: "A private way shall not be merged if the place where it is used becomes a public way."<sup>3</sup> We have no doubt that the private right of a property owner abutting on a way or having a special interest in it may be protected, since his rights are rights of property distinct from those of the public, but we believe that the public easement may merge the private right of way in cases where the owner of the dominant estate suffers rights to be acquired by the pub-

<sup>1</sup>Radway v. Briggs, 37 N. Y. 256; People v. Lambier, 5 Denio, 9; Fowler v. Mott, 19 Barb. 204. The term road is sometimes used as synonymous with the word highway. Brace v. New York Central R. R. Co., 27 N. Y. 269. A highway in the strict sense of the term may, it has been held, be acquired across a public square. Board v. Huff, 91 Ind. 333.

<sup>2</sup>Shellhouse v. State, 110 Ind. 509; Illinois Ins. Co. v. Littlefield, 67 Ill. 368; Hall v. McLeod, 2 Metc. (Ky.) 98; Carpenter v. Gwynn, 35 Barb. 395; Stacey v. Miller, 14 Mo. 478, S. C. 55 Am. Dec. 112. But we suppose it to be clear that if the public authorities should treat it as a pub-

lic highway and private citizens should acquire rights on the faith that it was a highway, the owner would be estopped to recover the land, although, in the proper case and under a statute permitting it, he might recover the value of the land appropriated. An owner may in many cases estop himself from recovering the land itself and yet have his action for damages. It seems to us that this doctrine is peculiarly applicable to highways. Indiana, etc., R. R. Co. v. Allen, 113 Ind. 581; Midland R. W. Co. v. Smith, 113 Ind. 233; Louisville, etc., R. R. Co. v. Beck, 119 Ind. 124.

<sup>3</sup>Woolrych on Ways, 78; 4 Law Library, 58; Allen v. Ormond, 8 East, 4.



lic and by private citizens under such circumstances as create an equitable estoppel precluding him from defeating the public right of passage.<sup>1</sup> Whether a private way is transformed into a public one must generally be determined on the facts of the particular case.

A road is a passage ground appropriated to public travel.<sup>2</sup> The word "road" can not, however, be said to be one of uniform meaning; it has been variously defined, and is often enlarged or restricted by the language with which it is associated. Thus it may mean either a private way or a public thoroughfare,<sup>3</sup> or it may mean the land over which the public or private way is established.<sup>4</sup> In statutes, its meaning is ascertained from the context and purpose of the particular legislative enactment in which it is found.<sup>5</sup> Roads may be such as are owned by private corporations and maintained at private expense, or they may be such as are owned by public corporations and maintained at the public expense. Of the former class are toll roads, such as turnpikes, gravel roads, plank roads, and the like; of the latter, highways owned by governmental corporations, as counties and townships. A public way through the country may appropriately be designated as a road, while a public way in a town or city may properly be called a street. The terms road and street denote passage ways for free public use. The difference in the two classes of highways is created by their location. A road is a suburban way open to public travel, and this is almost, but not quite, the only use which can be made of it,

<sup>1</sup> We think the mere private easement is lost in the public one, since we do not believe that a way can, at the same time, be both a public and a private way. It must be a public way under legislative control or a mere private easement. But it does not follow because a right of way is transformed into a public road that private rights are lost, for these still continue to exist, subject, of course, to the enlarged easement. *Ross v. Thompson*, 78 Ind. 90.

<sup>2</sup> *Webst. Dic.*, tit. "Road," approved in *Manchester v. City of Hartford*, 30

*Conn.* 118, op. 120; *Respublica v. Arnold*, 3 Yeates, 417, op. 421; *Morgan v. Palmer*, 48 N. H. 336; *Stedman v. Southbridge*, 17 Pick. 162.

<sup>3</sup> *Commonwealth v. Gammons*, 23 Pick. 201. Held synonymous with "public highway" in *Heiple v. East Portland*, 13 Ore. 97.

<sup>4</sup> *Chollar and Potosi Mining Co. v. Kennedy*, 3 Nev. 361.

<sup>5</sup> In the statute law of N. Y. it is synonymous with highway. *Fowler v. Lansing*, 9 Johns. 349.

while urban ways may, as we shall hereafter more clearly show, be devoted to many other public uses.

Rural highways may, we think, be appropriately and conveniently denominated roads, and the public ways of a town or city may be properly and conveniently called streets. If the general term "highways" were less often used in statutes and decisions much confusion would be avoided, for, as we have seen, the term "highways" is a very comprehensive one, embracing in its wide sweep many more ways than urban streets or suburban roads. The word "road" naturally conveys the idea of a way over which the people have a right to pass and repass at pleasure, and is now commonly used as denoting a public way in the country rather than the street of a town or city. It may, when accompanied by the word "private," or words conveying a like meaning, denote a private easement, but such an easement is more appropriately called a right of way.<sup>1</sup>

Public roads are such as are open to the public, and are under the control of governmental instrumentalities, as counties, townships, road districts and local subdivisions of a similar character. Such roads are set apart to the public and are maintained at the public expense.<sup>2</sup> Toll roads are, in a limited sense, public roads and are highways for travel, but we do not regard them as public roads in a just sense, since there is in them a private proprietary right. This right, granted to them by their charters, is, as is well known, a right in the nature of a contract and as such protected from destruction or impairment by the Constitution of the United States. The private right which turnpike companies possess in their roads deprives these ways in many essential particulars of the character of public roads. It seems to us that, strictly speaking, toll roads owned by a private corporation, constructed and maintained

<sup>1</sup> Wild v. Deig, 43 Ind. 458; Hart v. Red Cedar, 63 Wis. 638; Horner v. State, 49 Md. 286. Roads are ways of a different general character from a mere right of way. Chollar, etc., Co. v. Kennedy, 3 Nev. 361, S. C. 93 Am. Dec. 409.

<sup>2</sup> Mills v. State, 20 Ala. 86. A res-

ervation for "a road" in a deed imports *prima facie* a public road. Morgan v. Palmer, 48 N. H. 336. The term "road" employed in a statute does not ordinarily include farm crossings. Brooks v. N. Y., etc., R. R. Co., 13 Barb. 594; Greene v. E. & M. R. R. Co., 24 N. J. Law, 486.

for the purposes of private gain, are not public roads, although the people have a right to freely travel them upon the payment of the toll prescribed by law. They are, of course, public in a limited sense, but not in such a sense as are the public ways under full control of the State, for public ways in the strict sense are completely under legislative control.

It is unquestionably true that the term "highways," or "public<sup>1</sup> highways," when used in statutes or contracts, does not always embrace toll roads although toll roads are highways. It is to be regretted that the term "highways" has not been more accurately employed by the courts and text writers, for it is undeniably true that confusion, and sometimes injustice, has resulted from the use of this vague and ill defined term. Whether streets, ferries, railroads, rivers, or rural roads, are all meant to be included in a particular statute can not, in many instances, be asserted without a careful study of the entire statute and a full consideration of all the matters which the courts usually call to their assistance in ascertaining the meaning and effect of legislative enactments. A word capable of so many different meanings can seldom, of its own force and vigor, influence the judicial mind engaged in the work of ascertaining and enforcing the legislative intention.

All roads established by legislative authority are public roads in so far as the right of the citizens to travel them is concerned, but they do not all belong to the State. It must, however, be true that over all ways in which there is a public right there must be some legislative authority. Presumptively all roads laid out under legislative enactments are public ways belonging to the State and under the full control of the legislature.<sup>2</sup> This legislative control is much broader than in cases where the private corporation has a proprietary interest in the road.

Under the common law, public roads were under the charge of the local authorities, and upon them rested the duty of keeping the roads in repair. Bridges were, by that law, committed to the charge of the counties and they were bound to maintain

<sup>1</sup>The word "public" is tautological. 1 McM. (S. C.) 44; *State v. Sartor*, 2

<sup>2</sup>*Sherman v. Buick*, 32 Cal. 241, S. Strob. (S. C.) 60; *Ex parte Withers*, C. 91 Am. Dec. 577; *State v. Mobeley*, 3 Brev. (S. C.) 85.

them in a safe condition for use. In America the subject is so much controlled by statute that it is difficult to state any general rules; it may, however, be said that where a road does not extend beyond the limits of one township it is to be deemed a township road, and that where it extends beyond the limits of a township any considerable distance it is a county road. Public roads such as county and township roads are maintained by taxes levied upon the citizens for that purpose. In many of the States provision is made for working out the road tax, as it is called, and the tax is paid in labor instead of money.

Roads generally used by the citizens of a locality are public roads, although they may afford facilities for travel to only such persons as reside in the neighborhood, and may not be useful to the general public.<sup>1</sup> It is, however, essential that such a road should be one open to the public, and free and common to all the citizens.<sup>2</sup> Private ways constructed for the use of designated persons are not public roads, although the persons having the right to use the way are very numerous; for as long as any citizens are excluded from a common use it is not a public road, and the public can not be charged with the expense of repairing it, nor can the right of eminent domain be invoked for the purpose of seizing land for such a way.<sup>3</sup> The character of the road does not depend upon its length, nor upon the places to which it leads, nor is its character determined by the number of persons who actually travel upon it. If it is free and common to all the citizens, then, no matter whether it is or is not of great length, or whether it leads to or from city, village, or hamlet, or whether it is much or little used, it is a public road.

Public ways are generally of a fixed and permanent character and of defined and established dimensions. Such roads are established by law, arise from prescription, or are created by dedication. There is, however, a right of passage of a peculiar nature, neither given by statute nor created by dedication,

<sup>1</sup> Woolrych on Ways, 3; Kissinger v. v. Herbst, 54 Iowa, 168; Wood v. Hurd, 34 N. J. L. 88.

Hanselman, 33 Ind. 80; Verner v. Martin, (W. Va.) 28 Alb. L. Jour. 295; <sup>2</sup> Woolrych on Ways, 4; Stewart v. Hartman, 46 Ind. 331.

<sup>3</sup> Blackman v. Halves, 72 Ind. 515.

nor founded on a claim of prescription. The way to which we refer is ordinarily of a temporary character, and the principle which supports the right is not unlike that which undergirds the doctrine of private ways by necessity. The right of which we are here speaking is the right of a traveler who is lawfully using the public road to go upon private land at places where the public way is impassable.<sup>1</sup>

Lord Mansfield says, that the rule that a traveler may leave the public way and go upon adjoining land, when the highway is foundurous, was recognized both by the civil and the common law,<sup>2</sup> and he refers to Blackstone and Comyns. The authorities are not agreed as to what principle the right should be placed on. A learned English author<sup>3</sup> puts it upon the maxim, "*Salus populi suprema lex*," while others put it upon the doctrine of necessity.<sup>4</sup> The rule is firmly established, notwithstanding the diversity of opinion as to the ground upon which it rests.<sup>5</sup>

One who leaves the usually traveled track and goes upon adjoining land is bound to refrain from doing any unnecessary injury, under penalty of being held liable in damages at the

<sup>1</sup> A road so out repair as to justify a traveler in leaving it and going upon the adjoining land is said to be "founderous," meaning, if we judge from the derivation of the word, likely to cripple, or make lame. Burke thus uses the word "founderous": "I have traveled through the negotiation and a sad founderous road it is." Regicide's Peace, letter 3.

<sup>2</sup> Taylor v. Whitehead, 2 Douglas, 744-748; 3 Blackst. Com. 36; Comyns Digest, title, chemin, D. 6. In the case cited, Lord Mansfield said: "If the usual track is impassable, it is for the general good that people should be entitled to pass in another line."

<sup>3</sup> Broom's Legal Maxims, 1.

<sup>4</sup> Campbell v. Race, 7 Cush. 408; Morey v. Fitzgerald, 56 Vt. 487, S. C. 48 Am. R. 811. In the case last cited it was said: "In such case, an interfer-

ence with private property is obviously dictated and justified *summa necessitate*, by the immediate urgency of the occasion, and a due regard to the public safety or convenience."

<sup>5</sup> Carrick v. Johnson, 26 Upper Can. Q. B. 65; Ballard v. Harrison, 4 M. & W. 392; Pomfret v. Sicroft, 1 Saunders, 323; Henns Case, 3 Salk. 182; Dawes v. Hawkins, 8 C. B. N. S. 848; Campbell v. Race, 7 Cush. 468, S. C. 54 Am. Dec. 728; Carey v. Rae, 58 Cal. 163; Williams v. Safford, 7 Barb. 309; Newkerk v. Sabler, 9 Barb. 655; Holmes v. Seely, 19 Wend. 507; Morey v. Fitzgerald, 56 Vt. 487, S. C. 48 Am. R. 811. Mr. Woolrych thus states the rule: "If the ordinary track be so dangerous as to compel them to leave the road, they may go *extra viam*, passing as near the original way as possible." Woolrych on Ways, 78.

suit of the owner of the land.<sup>1</sup> It seems from the authorities that it is his duty to keep as near as practicable to the usually traveled way.<sup>2</sup> The fact that the person having a right to use the road knows that it is foundeours will not, it is held, deprive him of the right to deviate from the usually traveled track unless there is some other way which he can reasonably travel.<sup>3</sup> It is not essential to the right to go upon adjoining land that the necessity should be absolute, but there must be a reasonable necessity for thus entering upon the lands of a citizen. We suppose that it must in most cases be a question of fact whether there was such a reasonable necessity as justified the traveler in leaving the traveled way. We believe that it would not, however, be necessary to show in any case that to attempt to keep in the traveled way would certainly result in injury, but that it is enough to show that serious injury would probably result from continuing in the road.

An interesting question is suggested, but not decided or discussed in the case last referred to, and that is this: If the obstruction in the road is of a temporary character and one that may be readily removed, and is not placed there by the land owner, must the traveler remove it, or may he leave it and pass

<sup>1</sup> *Henns Case*, Wm. Jones, 296; *Abser v. French*, 2 Lev. 234.

<sup>2</sup> Chitty gives the form of a plea. 3 *Chitty Pl.* (7 ed.) 385; *Carrick v. Johnston*, 26 Upper Can. Q. B. 65.

<sup>3</sup> *Morey v. Fitzgerald*, 56 Vt. 487, S. C. 48 Am. R. 811. In this case it was said: "And although the defendant knew of the foundeours condition of the road before he attempted to pass over it, he was not thereby deprived of the right he otherwise would have to travel it. One has a right to travel highways when he is not thereunto impelled by imperious necessity as well as when he is, provided always, that he uses them for the purposes for which they are constructed and maintained. But when one knows that a highway is so obstructed as to necessitate a diverg-

ence therefrom on to adjoining land in order to get past the foundeours portions thereof, it is his duty to the adjoining land owner to go some other way, if there be one reasonably available to him, rather than to thus deviate." We suppose that whether there is another road reasonably available to the traveler must usually, and in the main, be a question of fact for the decision of the jury under proper instructions from the court. The question of what is or is not reasonable is rarely a pure question of law, although it may sometimes be so. In the case cited the burden of showing that there was some other reasonably convenient way seems to have been placed upon the land owner. *Farrelly v. City of Cincinnati*, 2 Disney, 537.

over the adjoining land.<sup>1</sup> In such case there would be conflicting rights, that of the traveler to use the highway, and that of the owner that his close should not be broken, and the question for solution is, which must yield? It is our opinion that if the traveler could readily remove the obstruction and not be seriously delayed it would, in general, be his duty to do so, but that if he could not readily remove it or would be seriously delayed in his journey, he would have a right to go upon the adjoining land. It would seem that the traveler must do all that is reasonably necessary to avoid entering the close of an adjoining proprietor, and that it is no more than reasonable to require him to remove a temporary obstruction where it will impose upon him no great labor and not materially delay him in his journey. Here, as elsewhere, the question must in a great measure be one of fact, for, as we believe, it would, in the majority of cases, be the duty of the court to leave the question of what was reasonable under the facts of the particular case to the jury, instructing them, of course, as to the general rules of law applicable to such cases. Many things must necessarily enter into consideration in such a case, such, for instance, as the nature of the obstruction, by whom it was placed in the road, the knowledge of the traveler of its character, and matters of a similar nature.

It has been held in two well considered cases that the defect need not be in the way itself, but that if it is caused by the accumulation of snow or ice there exists such a reasonable necessity for leaving the traveled way as will justify the traveler in going on the adjoining land.<sup>2</sup> We suppose, however, that as long as the way is in such a condition that it can be used with probable safety by one exercising ordinary care to avoid injury it would be his duty to keep in it. We suppose, also, that it would be the duty of the traveler to use such reasonable care as a prudent man would ordinarily exercise to keep his horses and

<sup>1</sup> In that case it was said, "If the obstruction is such that to remove it would materially delay the traveler in his journey, and to impose upon him considerable labor, no duty is upon him." *Morey v. Fitzgerald*, 56 Vt. 487, S. C. 48 Am. R. 811.

<sup>2</sup> *Campbell v. Race*, 7 Cush. 408, S. C. 54 Am. Dec. 728; *Morey v. Fitzgerald*, 56 Vt. 487, S. C. 48 Am. R. 811.

vehicle in such a condition as to enable him to use the traveled way, although it should be slippery from snow or ice. This, as we think, he is bound to do, for he can not excuse the invasion of another's close if he has not himself exercised due care and diligence.<sup>1</sup>

<sup>1</sup>In *Campbell v. Race*, *supra*, it was said: "Such a right is not to be exercised from convenience merely, nor, when, by the exercise of due care, after notice of obstructions, other ways may be selected and the obstructions avoided." This obligation to use due care must, on principle, extend beyond the duty to avoid known obstructions; it must extend so far as to require the traveler to prepare for a condition of the way that may be reasonably anticipated, as, for instance, it must extend so far as to require him to have his horses properly shod.



## CHAPTER II.

### STREETS AND ALLEYS.

A street is a road or public way in a city, town, or village.<sup>1</sup> A way over land set apart for public travel in a town or city is a street, no matter by what name it may be called; it is the purpose for which it was laid out and the use made of it that determines its character.<sup>2</sup> As the way is common and free to all the people, it is a highway, and it is proper to affirm that all streets are highways, although not all highways are streets.<sup>3</sup> Streets resemble, in many particulars, ordinary public roads, but there are, nevertheless, very important differences between the two classes of public ways. The purpose for which they are established is primarily the same, that of public travel, but many uses may properly be made of streets which can not be rightfully made of ordinary suburban roads.<sup>4</sup> The rights of the public are much greater in streets than in the roads of the rural districts, and the methods of regulating their use, improvement and repair are materially different.

A passage way for footmen, horsemen and vehicles in a city, town, or village, open and free to all the citizens, and accepted by the municipal authorities, is, ordinarily, a street, no matter what may be its length or width. "Street" is a generic term, and includes all urban ways which can be, and are, generally used for the ordinary purposes of travel. A narrow way, less in size than a street, is generally called an alley, but it is ob-

<sup>1</sup> *Brace v. N. Y. Central R. R.*, 27 N. Y. 269, 271; *State v. Moriarity*, 74 Ind. 104; *Heiple v. East Portland*, 13 Ore. 97.

<sup>2</sup> *Perrin v. N. Y., etc., Co.*, 36 N. Y. 120.

<sup>3</sup> *State v. Berdetta*, 73 Ind. 185; *Conner v. Prest.*, etc., 1 Blackf. 43; *Cox v. Louisville, etc.*, 48 Ind. 178; *State v. Wilkinson*, 2 Vt. 480; *Benedict v. Goit*, 3 Barb. 459; *Livingston v. Mayor*, 8 Wend. 85; 2 *Dillon Munic. Corp.*, § 683.

<sup>4</sup> See *Urban and Suburban Servitudes*, Chapter XX.

vious that whether the way is or is not to be called an alley depends upon the relation it bears to other ways in the same city or town; for in some cities or towns the way would be deemed so narrow as to be merely an alley and not a street, while in others it would be comparatively of such a considerable width as to take rank as a street. If the alley is a public one, it is a highway,<sup>1</sup> and, in general, is governed by the rules applicable to streets. The distinction between streets and alleys sometimes becomes important in the construction of statutes and ordinances providing for the improvement of the public ways of the city or town, and where this is so, the question, whether the particular way is a street or an alley, is to be determined from the statutes upon the subject, and the character and location of the particular way, or ways, concerning which the controversy is waged.

In strictness, a street is a paved, macadamized, or graveled public way, belonging to the State as one of its highways, but ordinarily the word "street" is employed as meaning any way set apart for the public use in a city, town, or village, whether improved or not.<sup>2</sup> Usually toll roads owned by private corporations can not be considered as streets.<sup>3</sup> A street is a public way in a much broader sense than that of a mere way for citizens to pass and repass, for it is a way under the charge and control of the municipal authorities, and not of any private corporation. It is in the strictest sense, a highway free to all, and maintained not for private gain, but for the public benefit.<sup>4</sup> In it no private corporation, such as a turnpike company, has any special property rights; no person, artificial or natural, has, indeed, any

<sup>1</sup> *Morris v. Bowen, Wright (Pa.) 749.*

<sup>2</sup> *Brace v. New York Central R. R. Co., 27 N. Y. 271; Com. v. Boston, etc., Co., 135 Mass. 551; Sharets Road, 8 Pa. St. 92.* "Strictly," said Marvin, J., in *Brace v. New York, etc., R. R. Co., supra*, "a street is a paved way or road, but the word is used for any road or way in a city or village." This rule becomes important when it is considered that a municipal corporation is

liable for a negligent omission to keep its streets safe for passage, since this duty extends to all streets upon which the public are expressly or impliedly invited to travel, whether they have been improved or not.

<sup>3</sup> *Wilson v. Allegheny City, 79 Pa. St. 272.*

<sup>4</sup> *Respublica v. Arnold, 3 Yeates, 422; Reed v. Erie, 79 Pa. St. 346; Hamlin v. City of Norwich, 40 Conn. 25.*

special right in it except the abutters or the owners of the fee. So long as it is not diverted from the public primary use to which it was set apart, and so long as the special property rights of owners or abutters are not invaded, a street is subject to legislative control, as one of the highways of the State.<sup>1</sup> The power of the legislature is very extensive, much more extensive than if a private corporation had rights in a way under a charter granted to it; but, extensive as this power is, it does not authorize the taking of special property rights in the way possessed by the owners of the fee and the abutters. Of the rights of the owners and abutters we shall hereafter speak at length, and no more is here needed than this suggestion.

If an owner of land makes a plat of a city or town, and refers to streets, he must be taken to mean public urban ways in all that the term implies.<sup>2</sup> He sets apart, by such an act, the land indicated as a street to all the public uses to which a public urban way may be properly appropriated. The easement thus created is determined by applying to the word "street" the signification usually assigned it by the law. If property on the line of a way designated as a street is acquired on the faith of the owner's act, he will not be permitted, as against the persons so acquiring the property, to defeat by his own act their right to have it regarded as a street with all the usual and appropriate incidents of such a public highway.<sup>3</sup> Where a plat of a town or city is made and recorded, and lots are designated thereon, with spaces

<sup>1</sup> *O'Conner v. Pittsburgh*, 18 Pa. St. 187; *Lennon v. Mayor*, 55 N. Y. 365. *In re Sackett St.*, 74 N. Y. 95; *Perry v. New Orleans, etc., Co.*, 55 Ala. 413; *Barney v. Keokuk*, 94 U. S. 324. It has been held that the legislature may establish turnpike gates in a city. *Stormfeltz v. Turnpike Co.*, 13 Pa. St. 555, but this can hardly be correct where the land has been dedicated for a street, free and common to all, for the benefit from a free road may have moved the donor to make the dedication.

<sup>2</sup> *City of Denver v. Clements*, 3 Col. 470. In this case it was said by the

court: "The term street used upon a map of a town or city imports a public way for the free passage of its trade and commerce. Such is its natural and usual signification, and it is inconceivable having reference to the ordinary course of business, that a party so surveying and mapping his lands without any express reservation, should intend that the streets thereon designated as such, should be regarded as mere private ways, for the use of those only purchasing."

<sup>3</sup> *City of Indianapolis v. Kingsbury*, 101 Ind. 200.

left which fairly indicate that they are set apart to the public, the spaces thus indicated are presumptively streets.<sup>1</sup> The rights which spring from a recorded plat, designating spaces as public ways, are very comprehensive and enure to the benefit of persons who purchase under such a plat as well as to the benefit of the public, for such persons have a right to the whole way as a street, and the owner can not close the street on either side of them.<sup>2</sup> It is a familiar rule, illustrated by a great throng of cases, that one who names a street in a deed conveying a town or city lot is held to mean a public urban way.

In accordance with the principle established in the classes of cases of which we have made mention, it is quite safe to affirm that where a statute, or a contract, speaks of a street and does so with reference to a town or city, and there are no limiting or explanatory words, it must be taken to mean a street in the true sense of the term. It is sometimes necessary to discriminate between the genus highways and the species streets,<sup>3</sup> but when the species is designated there can seldom be any difficulty in determining what class of public ways is intended, although it will not do to conclude, in all cases where the term highways is employed, that streets are included.

The character which the location of a public way in a town or city impresses upon it so essentially distinguishes it from an

<sup>1</sup> *Hanson v. Eastman*, 21 Minn. 509; *Yates v. Judd*, 18 Wis. 118; *Sanborn v. Chicago, etc., R. W. Co.*, 16 Wis. 19.

<sup>2</sup> *City v. Kingsbury*, *supra*, p. 212; *Rowan v. Town of Portland*, 8 B. Monroe, 232; *Trustees v. Perkins*, 8 B. Monroe, 207; *City of Winona v. Huff*, 11 Minn. 119; *Huber v. Gazley*, 18 Ohio, 18; *Town of Derby v. Alling*, 40 Conn. 410; *Moale v. Mayor*, 5 Md. 314. The street as laid out is, in fact, an appurtenance of the lot conveyed to the purchaser. *Ott v. Kreiter*, 1 Atl. R. 724; *City v. Kingsbury*, *supra*, p. 221.

<sup>3</sup> *State v. Harden*, 11 S. C. 368; *Boston, etc., Co. v. Boston*, 140 Mass. 87. A highway is, "A lawful public road." *Vantilburg v. Shann*, 24 N. J. Law, 724.

But a street is a lawful public road of a town or city, and as such, is for many purposes, and as to many duties, different from an ordinary rural road. Its existence in a town or city gives it a distinctive and peculiar character. Statutes naming highways can not, therefore, always be construed to embrace streets. "There is a recognized distinction between highways or roads and streets, although they are often used in the same sense as importing a public way for passage or travel." *Heiple v. City of East Portland*, 13 Ore. 97. It seems to us that it must be said of this case that the court correctly stated the general principle, but erred in its application.

ordinary suburban way, that one who should apply to a street the same rules, in all respects, as those which govern a country road, or who should invariably construe a statute containing the word "highways" as embracing streets, would often go far astray.<sup>1</sup> The right of the public in a street is by no means confined to the surface of the way,<sup>2</sup> and this all who set apart land for a street are conclusively presumed to know: "Street" means more than the surface; it means the whole surface and so much of the depth as is, or can be, used, not unfairly, for the ordinary purpose of a street. It comprises a depth which authorizes the urban authority to do that which is done in every street, namely, to raise the street, and lay down sewers—for, at the present day there can be no street in a town without sewers—and, also, for the purpose of laying down gas and water pipes. 'Street,' therefore, includes the surface and so much of the depth as may not unfairly be used as streets are used."<sup>3</sup> We think it clear, that it is erroneous to apply statutes governing rural ways to urban streets, unless the language employed expressly or by fair implication, shows that the legislature, in employing the general term "highways," meant to include the streets of a municipal corporation. It would certainly be erroneous to conclude that a statute using the term "highways," presumptively included railroads, tramways, canals or navigable streams,<sup>4</sup> yet these are all highways.<sup>5</sup> It is therefore not

<sup>1</sup> *State v. Moriarity*, 74 Ind. 104; *Kelsey v. King*, 33 How. Pr. R. 43; *City of Quincy v. Jones*, 76 Ill. 244.

<sup>2</sup> See *Urban and Suburban Servitudes*, Chapter XVII.

<sup>3</sup> In the case from which we have quoted, *Coverdale v. Charlton*, 4 L. R. Q. B. Div. 104, the act of Parliament provided that, "all streets shall vest in and be under the control of the local board," and it was held that by force of this enactment the local board could lawfully demise the right of pasturage in the street. This is carrying the rule to great lengths, and it is difficult to reconcile the ruling with the general doctrine that the easement ac-

quired by the public does not extend beyond a purely public use, leaving all other rights in the owner of the fee. The reasoning of the judges, Bramwell, Brett and Cotton very clearly demonstrates the difference between an urban street and a suburban road.

<sup>4</sup> *State v. Johnson*, Phill. L. 140; *Seneca Road Co. v. Auburn, etc., Co.*, 5 Hill, 170; *Glass v. State*, 30 Ala. 529; *Buncombe Turnpike Co. v. Baxter*, 10 Iredell L. 222.

<sup>5</sup> *Keppel v. Bailey*, 1 Myl & Keen, 547; *Tainum v. Blackstone Canal Co.*, 1 Sumn. U. S. C. C. 46; 2 *Smith's Leading Cases*, 142; *Wilson v. Blackburn Creek*, 2 Peters, 245.

to be assumed that streets are presumptively referred to when a statute speaks of highways; on the contrary, the presumption should be that the statute refers only to ordinary rural public roads, under the control of local highway officers, unless there is language which indicates an intention to include urban ways, or that intention is inferable from the scope and object of the statute.<sup>1</sup>

The term street in ordinary legal signification includes all parts of the way, the roadway, the gutters and the sidewalks.<sup>2</sup> While the term is ordinarily used as designating the whole of the urban way, it does not invariably receive this meaning. There are cases in which the term street will be construed to mean only that part of the way which lies between the parts especially intended for footmen. These parts are usually placed on either side of the way and are commonly called sidewalks.<sup>3</sup> It often becomes important to distinguish between the part of the way intended for horsemen and vehicles, and that part intended especially for the use of pedestrians, and the term sidewalks has come to be generally used in this country for the purpose of designating this part of the way, and as the term is an expressive and convenient one it is likely to find a permanent place in legal terminology.

In statutes and municipal ordinances directing the grading and paving of urban ways the word "street" is often, and, indeed, generally, understood to mean that part of the way intended especially for the use of horsemen and vehicles, lying between the sidewalks.<sup>4</sup> While sidewalks are designed for the especial use of

<sup>1</sup> *Cleaves v. Jordan*, 34 Me. 9; *Waterford v. Oxford Co.*, 59 Me. 450.

<sup>2</sup> In matter of *Burmeister*, 76 N. Y. 174; *State v. Berdetta*, 73 Ind. 185; *Bloomington v. Bay*, 42 Ill. 503; *Hall v. Manchester*, 40 N. H. 410; *Manchester v. Hartford*, 30 Conn. 118; *Himmelman v. Satterlee*, 50 Cal. 69; *Clark v. Com.*, 14 Bush. 169; *Debolt v. Carter*, 31 Ind. 355; *State v. Moriarty*, 74 Ind. 104; *Taber v. Grafmiller*, 109 Ind. 206.

<sup>3</sup> *Challis v. Parker*, 11 Kan. 384. Distinction between sidewalk and crosswalk is drawn in *O'Neil v. City of Detroit*, 50 Mich. 133. Also in *City of Detroit v. Putnam*, 45 Mich. 263; *Pequiquot v. City of Detroit*, 16 Fed. Rep. 211.

<sup>4</sup> *Mayo v. Haynie*, 50 Cal. 70; *Philadelphia v. Lea*, 9 Phila. 106; *Dyer v. Chase*, 52 Cal. 440. Compare *Woodruff v. Stewart*, 63 Ala. 212.

footmen<sup>1</sup> they are not bound to keep upon them in all cases, but have a right in many instances to use other parts of the way. All parts of the street, from side to side and end to end, are for the public use in appropriate and proper methods,<sup>2</sup> and are not for permanent private use; but temporary use may often be made of the streets, although it is not of a public nature, as for loading and unloading goods and the like.<sup>3</sup>

The legislative power over streets, whether exercised directly by the legislature itself or delegated to municipal corporations, is very great and very broad, but, as we shall hereafter more fully show, it is not without limitations. It is perhaps enough to say at this point that streets in which private rights and public interests have vested can not be diverted to a permanent private use.<sup>4</sup> It is, in general, true that a street is solely for public use, and the public are entitled to use every part of it.<sup>5</sup> Where a street is opened under the right of eminent domain, and, as is ordinarily the case, at the expense of private property owners, there is no just reason for holding that the legislature can take from them without compensation the right to have the way remain open as a public street. The right to assess the property owners for the street rests upon the theory that a special benefit enures to them, and we can conceive no valid reason which will support the theory that this benefit may be taken from them at the pleasure of the legislature. The case is all the stronger when, as is usually true, the abutters acquire lots and make improvements on the faith that the way will remain a street. When, therefore it is asserted, as it sometimes is, that the legislature "has plenary power over municipal streets," it must be understood that it has power over them as

<sup>1</sup> Sidewalks set apart for footmen can not be lawfully used by vehicles. *Mercer v. Corbin*, 117 Ind. 450.

<sup>2</sup> *State v. Berdetta*, 73 Ind. 185, S. C. 38 Am. Rep. 117, n. 127; 1 Addison on Torts, 328, § 313.

<sup>3</sup> *North Manheim Tp. v. Arnold*, 119 Pa. St. 380, S. C. 4 Am. St. Rep. 650, *Wood v. Mears*, 12 Ind. 515, S. C. 74 Am. Dec. 222; *People v. Cunningham*,

1 Denio, 524, S. C. 43 Am. Dec. 709; *Steele v. Birkhart*, 104 Mass. 59, S. C. 6 Am. Rep. 191.

<sup>4</sup> *Chicago, etc., Co. v. Garrity*, 115 Ill. 161; *Lee v. Mound Station*, 118 Ill. 312; *Chicago v. Crosby*, 111 Ill. 540; *State v. Berdetta*, 73 Ind. 185.

<sup>5</sup> *Scott v. New Boston*, 26 Ill. App. 108.

streets, for it can not be justly affirmed that it may entirely deprive them of their character as streets to the special injury of abutters without yielding them fair compensation for the loss actually sustained.

Where the term alley is used in a plat or in a statute concerning towns or cities, it will be taken to mean a public way, unless the word private is prefixed or the context requires that a different meaning be assigned to the term.<sup>1</sup> Whatever may be the dimensions of a way, if it be opened to the free use of the public, it is a highway; nor is its character determined by the number of persons who actually use it for passage. The right of the public to use the way and not the size of the way or the number of persons who choose to exercise that right determines its character.<sup>2</sup> An alley of small dimensions, actually used by only a limited number of persons, but which the public have a general right to use, therefore, may be regarded as a public way. It is to be understood, of course, that the way can not be deemed a public one so as to charge the local authorities with the duty of maintaining it, unless it has been legally established or accepted; but if it is so established or accepted it is to be considered one of the public ways, whatever may be its size or situation, provided it is suitable for any kind of travel by the public.

Where an alley is ordered to be opened by the proper munic-

<sup>1</sup> *Hatton v. Chatham*, 24 Ill. App. 622; *Lasalle v. Matt., etc., Co.*, 16 Ill. App. 74; *Bailey v. Culver*, 12 Mo. App. 175. In the case first cited it was said: "In his leases, the owner called it an alley, and that word, when not qualified by the term private, is conventionally understood, in its relation to towns or cities, to mean a narrow street in common use."

<sup>2</sup> *Rex v. Richardson*, 8 T. R. 634; 4 Bacon's Abridg. 666. The Supreme Court of Michigan holds that an alley is not a highway, but we can not assent to the general doctrine declared by that court. *Paul v. Detroit*, 32 Mich. 108;

*Beecher v. People*, 38 Mich. 289; *Bagely v. People*, 43 Mich. 355. In the case of *Osage City v. Larkin*, 40 Kan. 206, 19 Pac. R. 658, the court held that an alley is a public highway which the municipal corporation is bound to keep in a reasonably safe condition for travel, but it was said that it is probably true that it is not bound to keep it in the same condition as a street. In the *City of Indianapolis v. Murphy*, 91 Ind. 382, the city was held liable to one who sustained an injury from a defect negligently suffered to remain unguarded in an alley.



ipal authority, it is deemed to be one of the public ways of the municipality. The right of eminent domain may be exercised in opening alleys in substantially the same manner as in opening streets. If it appears on the face of the record that the proper authorities have directed that the way shall be established as a public alley, a public use is shown justifying the condemnation of the strip of ground sought to be appropriated.<sup>1</sup> As in the case of streets, it is necessary, in order to bind the public to show that there has been an acceptance of the alley marked on the plat.<sup>2</sup> A mere permissive use of a way laid out as a private alley will not, of itself, transform it into a public alley.<sup>3</sup> An adjoining owner, it has been held, is entitled to use a public alley for air and ventilation,<sup>4</sup> but this use, as we believe, may be regulated under the police power resident in the State. The public character of an alley can not be lawfully destroyed.<sup>5</sup> The rights and duties of a municipal corporation respecting alleys are substantially the same as those respecting streets. They may be improved at the expense of adjoining owners, and it is the duty of the municipality to use ordinary care to make and keep them in a reasonably safe condition for travel.<sup>6</sup> It has been held that alleys may be included with streets in an ordinance providing for an improvement at the expense of adjoining owners.<sup>7</sup> They can only be vacated in the mode provided by law.<sup>8</sup> Whether it is, or is not, expedient to vacate an alley is a question for the decision of the proper local authorities, but, in proceeding to enforce their decision, the local officers must pursue the course prescribed by statute.

<sup>1</sup> *City of Savannah v. Hancock*, 91 Mo. 54, 3 S. W. R. 215.

<sup>2</sup> *Hamilton v. Chicago, etc., Co.*, 124 Ill. 241. It was held in this case that where the owner who has platted ground sells before acceptance, his grantee takes the land burdened with the offered dedication.

<sup>3</sup> *Dexter v. Tree*, 117 Ill. 535.

<sup>4</sup> *Dexter v. Tree*, 117 Ill. 535.

<sup>5</sup> *St. Louis, etc., Co. v. Bellville*, 20 Ill. App. 580.

<sup>6</sup> *Marseilles v. Howland*, 124 Ill. 551.

<sup>7</sup> *Springfield v. Green*, 120 Ill. 269.

<sup>8</sup> *Spiegel v. Gansberg*, 44 Ind. 418; *Dexter v. Tree*, 117 Ill. 535; *St. Louis, etc., R. R. Co. v. City of Belleville*, 122 Ill. 376.

## CHAPTER III.

### BRIDGES.

A public bridge is a structure across a creek, river, or other natural body of water, or across a canal, ditch, or other artificial water way, erected for the accommodation of the public.<sup>1</sup> Approaches are parts of the bridge. The term "bridge" conveys the idea of a passage way by which travelers are enabled to pass over streams, or other impediments to free passage, and, therefore, a building inaccessible at either end is not, in law, regarded as a bridge.<sup>2</sup> According to the common law, it is essential that a bridge should be built across a stream, and that it should contain a footway; so that a building across a ditch, or one carrying a railway across a stream, but having no footway, is not a bridge.<sup>3</sup> This narrow definition is not accepted as the correct one by the modern American cases, but a more enlarged meaning is generally assigned to the term.<sup>4</sup>

A bridge is an essential part of a road, and "the erecting of a bridge is but the laying out of a highway."<sup>5</sup> This, however,

<sup>1</sup> *Bouv. Inst.* 175; *Enfield Bridge Co. v. Hartford*, 17 Conn. 40; *Board of Chosen Freeholders v. Strader*, 18 N. J. Law, 108; *Whitall v. Freeholders*, 40 N. J. Law, 302; *Rusch v. Davenport*, 6 Ia. 455.

<sup>2</sup> *Board, etc., v. Strader*, 18 N. J. Law, 108; *Tolland v. Willington*, 26 Conn. 578; *State, ex rel., v. Demaree*, 80 Ind. 520; *Reg. v. Lincoln*, 8 Ad. & El. 65; *Bardwell v. Jamaica*, 15 Vt. 438; *White v. Quincy*, 97 Mass. 430.

<sup>3</sup> *State v. Hudson Co.*, 30 N. J. Law, 137, 147; *Proprietors v. Hoboken Land Co.*, 13 N. J. Eq. 503; *Same v. Same*, 1 Wall. 116; *McLeod v. Savannah R. R. Co.*, 25 Ga. 445; *Roe v. Whitney*, 4 Nev. & M. 594.

<sup>4</sup> *State v. Gorham*, 37 Me. 451; *Mc-*

*Kinley v. Chosen Freeholders*, 29 N. J. Eq. 164; *State v. Gloucester*, 40 N. J. Law, 302; *Board v. Brown*, 89 Ind. 48, 52. But compare *Taylor v. Davis*, 40 Ia. 295. A mere causeway is not a bridge. *Swanzy v. Somerset*, 132 Mass. 312.

<sup>5</sup> *Paine v. Patrick*, 3 Mod. 244; *People v. Com'rs*, 4 Neb. 150; *People v. President, etc.*, 23 Wend. 254; *Jones v. Keith*, 37 Tex. 394; S. C. 14 Am. Rep. 382; *Parker v. Boston and Maine R. R.*, 3 Cush. 107; *Rush v. Davenport*, 6 Ia. 443; *Commonwealth v. Cent. Bridge Corp.*, 12 Cush. 242, 244. See, also, *Washer v. Bullet Co.*, 110 U. S. 558, 564; *City of Chicago v. Powers*, 42 Ill. 169; *Beaver v. Manchester*, L. J., 26 Q. B.

is true only in cases where the bridge is a public one, for there are public and private bridges. A public bridge is one open to all the people upon equal terms. "A private bridge is one erected for the use of one or more private persons, although it may be occasionally used by the public."<sup>1</sup> A bridge used by the public at all times when it is dangerous to ford the river, or at times when floods render a crossing at other places hazardous, is a public bridge, although it may be out of the line of the usually traveled way.<sup>2</sup> "The principal circumstance," says Woolrych, "necessary to constitute a public bridge is, that the people at large may have a free and uninterrupted use of it, not upon sufferance, but as a matter of right."<sup>3</sup>

Public bridges may be built by the public authorities at the public expense, as State, county or township bridges; they may be built by turnpike or bridge corporations, or they may be built by individuals and given to the public.<sup>4</sup> All such bridges are highways. Where bridges are built by individuals and are beneficial to the public, and public use is made of them, they will be deemed public.<sup>5</sup> In presuming that bridges which are of benefit to the public have been accepted by the public, effect is given to the familiar principle that acceptance may be inferred from the beneficial character of the grant. A bridge may, however, be free and open to the public, yet the person by whom it was constructed be charged with maintaining it in safe and convenient condition for travel. This is so in cases where the facts show that the bridge was erected for private benefit, and not for public use. In such a case there is no presumption that the public has accepted the bridge and relieved the person by whom it was built from responsibility. Thus, where a private corporation digs a race way or canal across a highway and builds a bridge over it, there is no presumption

<sup>1</sup> Angell on Highways, § 35; King v. Bucks, 12 East, 203.

<sup>2</sup> Rex v. Buckingham, 4 Campb. 189; Rex v. Northampton, 2 M. & S. 262; Rex v. Devon, 2 Ry. & Mood. 144.

<sup>3</sup> Woolrych on Ways, 196.

<sup>4</sup> 1 Bouv. Inst. 176; King v. West Riding of Yorkshire, 2 East, 342; 5

Burr. 2594; Piscataqua Bridge Co. v. New Hampshire, 7 N. H. 59; Callender v. Marsh, 1 Pick. 432.

<sup>5</sup> Rex v. Glamorgan, 2 East, 356n; Rex v. Kent, 2 M. & S. 513; Rex v. Lancashire, 2 B. & Ad. 813; Heacock v. Sherman, 14 Wend. 58; State v. Compton, 2 N. H. 513.

of acceptance by the public, and the builder is charged with the duty of keeping it in a safe condition.<sup>1</sup> In such a case the benefit is to the builder, for the public, but for his act, could have traveled on the solid road.<sup>2</sup> Where, however, the bridge is of public utility and is not made necessary by the act of the person who built it, acceptance by the public will be presumed, and the builder will not be responsible for keeping it in safe and fit condition for travel. Bridges originally built by an individual for his own benefit, but which in time become of public benefit, and are generally used by the public, may be deemed public bridges. This would probably not be so if the builder, by his own act in interfering with a safe and convenient road, had created the necessity for the bridge; for, having created the necessity for it, he must, upon principle, be held bound to supply that necessity.<sup>3</sup> Where the public authorities expressly adopt a bridge constructed by individuals, or where they so build roads as to evidence an adoption and make the bridge a necessary part of the highway, they will be held to have taken the bridge in charge, and it will be their duty to keep it in safe and fit condition for travel.<sup>4</sup>

A bridge is, in a general sense, a highway, and the rules of the common law applicable to highways apply, generally, but only generally, to bridges. It is obvious that there are differences between the ways usually designated by the terms "highways," and "bridges" which render it impossible to always bring them under one rule. This is true, although they have in common the chief characteristic of being ways of passage for the public. It can not always be true that stat-

<sup>1</sup> Roll Abr. 368; *Dygert v. Schenck*, 23 Wend. 446, S. C. 35 Am. Dec. 575; *Heacock v. Sherman*, 14 Id. 58; *Phoenixville v. Phoenix Iron Co.*, 45 Pa. St. 135, S. C. 2 Am. Law Reg. 307.

<sup>2</sup> *Rex v. Kerrison*, 3 M. & S. 526; *King v. Inhabitants*, 14 East, 317; *Lowell v. Proprietors*, 104 Mass. 18; *Rex v. Desjardins Canal Co. (Ont.)*, 27 Q. B. 374.

<sup>3</sup> *City of Evansville v. Decker*, 84 Ind. 325, S. C. 43 Am. R. 86. See, also,

*State v. Madison*, 59 Me. 538; *Township of Newlin v. Davis*, 77 Pa. St. 317.

<sup>4</sup> *State, ex rel., v. Board*, 80 Ind. 478; *State, ex rel., v. Supervisors*, 41 Wis. 28; *Town of Dayton v. Town of Rutland*, 84 Ill. 279; *Bisher v. Richard*, 9 Ohio St. 495; *Houfe v. Town*, 34 Wis. 608, S. C. 17 Am. Rep. 463; *Batty v. Duxbery*, 24 Vt. 155; *Mayor v. Sheffield*, 4 Wall. 189. See, also, *Reg. v. Inhabitants*, 6 Mod. Rep. 307; *Rex v. Inhabitants*, 2 East, 342.

utes respecting highways extend to and include bridges; whether they do or not must depend upon the general tenor of the particular statute and the purposes it was intended to accomplish. It is quite clear that a statute concerning bridges can not be deemed to include roads and streets. We can not, therefore, accept without qualification the statement found in some of the books that a bridge falls within the rules applicable to highways. There are very many cases where an unqualified adoption of the broad general doctrine would lead to serious error. It is often necessary to consider bridges as distinct and independent subjects of legislation, and it is also often important to treat them as differing in material respects from ordinary highways laid out for the use of footmen, horsemen and vehicles. In order to charge a party with a breach of duty in maintaining a bridge in repair the word "bridge" should be used; it will not do to use the word "highway," for, as was said in one case, the "term 'bridge,' alone describes such a structure."<sup>1</sup> This word ordinarily, however, describes the whole structure, approaches, abutments, piers, and all the other parts which are necessary to make it a safe and convenient passage way for the public.<sup>2</sup>

Public bridges, as we shall now consider them, are such as are held in trust for the public by governmental corporations such as counties, townships, cities, towns, and villages, and are open and common to the public without the payment of toll. The governmental divisions named do not acquire any private right of ownership in bridges, but they have possession of them as trustees of the public under authority delegated by the legislature. The rights and liabilities of these various public cor-

<sup>1</sup>State v. Canterbury, 8 Foster (N. H.), 195; Rex v. Oxfordshire, 1 Barn. & Ad. 300.

<sup>2</sup>State, *ex rel.*, v. Demaree, 80 Ind. 520; Board v. R. & V. Gravel Road Co., 87 Ind. 502; Proprietors Bridge Co. v. Hoboken, etc., Co., 13 N. J. Eq. 504; Tolland v. Willington, 26 Conn. 578; Commonwealth v. Deerfield, 6 Allen, 449; Watson v. Proprietors, 14 Me. 201; Penn. Township v. Perry Co., 78 Pa.

St. 457; Clinton Bridge, 10 Wall. (U. S.) 454, 462; Whicher v. Somerville, 138 Mass. 454; Bardwell v. Jamaica, 15 Vt. 442. But it has been held that approaches are not necessarily parts of a bridge as a matter of law. Nims v. Boone Co., 66 Ia. 272. And compare Moreland v. Mitchell Co., 40 Ia. 394; Carter v. Boston and Prov. R. R. Co., 139 Mass. 525; Swanzy v. Somerset, 132 Mass. 312.

porations are much dependent upon statutes, and are, indeed, essentially different in many respects when considered entirely independent of statute. It will be convenient to consider public bridges as county bridges, township bridges, and municipal corporation bridges, and for the purpose of clearness we shall use the term "municipal corporations" as embracing only cities, towns, and incorporated villages. Many rights and some duties are held by and devolve upon these governmental subdivisions that are substantially the same in some respects, yet in others materially different. In some jurisdictions, their respective rights and duties are almost wholly prescribed by statute.

Whether a structure is or is not a bridge, may sometimes be a question of fact. The structure may be of such a peculiar construction, or so peculiarly located in the particular case, as to require its character to be determined by the jury under the facts of the particular instance. So it must sometimes be that what are parts of a bridge is a question to be determined as one of fact and not of law.<sup>1</sup> Generally, however, the question of what is or is not a bridge, is for the court and not the jury.

There can be no question as to the power of the State to authorize the construction and maintenance of bridges across streams within its territorial limits that are not navigable, and a State may authorize the construction of bridges across navigable streams within its territory, although its authority over such streams, when they are used for interstate commerce, is limited. The authority to construct bridges across navigable streams is restricted by the superior rights of the Federal government to control the avenues of commerce. Whether the Congress may, to the exclusion of the State, take entire control of the navigable waters of the country is a question which has not, we believe, been authoritatively decided, but it would seem that it would have this power under the provision of the national constitution vesting in Congress the power to regulate commerce between the States. The decisions upon the question immediately under mention recognize the right of the States

<sup>1</sup>Tolland v. Willington, 26 Conn. 506; Moreland v. Mitchell Co., 40 Ia. 578; Bardwell v. Jamaica, 15 Vt. 442; 394; Regina v. Southhampton, 14 Eng. Regina v. Gloucestershire, 1 Car. & M. L. Eq. 116.

to build bridges across navigable streams, but intimate that Congress may have a general right of control should it choose to exercise it.<sup>1</sup>

It is held that a general delegation of authority to lay out and open highways does not confer authority to build bridges across navigable streams.<sup>2</sup> A statute may expressly, or by clear implication, confer the right and impose such conditions and restrictions as the legislature deems expedient.<sup>3</sup> The question as to how far a State may go in authorizing the construction of a bridge across a stream forming one of the lines of commerce between the States is not fully defined by the adjudged cases. The cases have taken diverse views of the general question, but it may be considered, as the adjudications now stand, that a State may authorize the construction of a bridge across a navigable stream, although it may interfere with navigation.<sup>4</sup>

<sup>1</sup> *Willamette Iron Bridge Co. v. Hatch*, 125 U. S. 1; *Hamilton v. Vicksburg, etc., R. R. Co.*, 119 U. S. 280; *Escanaba Co. v. Chicago*, 107 U. S. 678; *Cardwell v. Am. Bridge Co.*, 113 U. S. 205; *Pound v. Turck*, 95 U. S. 459; *Gilman v. Phila.*, 3 Wall. 713; *Albany Bridge Case*, 2 Wall. 403; *Stillman v. Hudson River Bridge*, 1 Black. 582; *Veazie v. Moore*, 14 How. U. S. 568. There has been some Federal legislation upon the subject, and some bridges have been thereby authorized. R. S. of U. S., section 5244; *Hannibal, etc., R. R. Co. v. Missouri, etc., Co.*, 125 U. S. 260; *Miller v. New York*, 109 U. S. 385; *People v. Kelly*, 76 N. Y. 475. It seems that there is a difference between cases affecting bridges across navigable streams and cases affecting other phases of interstate commerce, for the latter decisions go to the extreme length in holding that inaction by Congress will not authorize State legislation. *Robbins v. Shelby Tax Dist.*, 120 U. S. 489; *Philadelphia, etc., Co. v. Penna.*, 122 U. S. 326.

<sup>2</sup> *Commonwealth v. Combs*, 2 Mass.

489; *Arundel v. McCulloch*, 10 Mass. 70; *Commonwealth v. Charlestown*, 1 Pick. 130; *Maxwell v. Bay Bridge Co.*, 41 Mich. 453.

<sup>3</sup> *Commonwealth v. Breed*, 4 Pick. 460; *Baltimore v. Stoll*, 52 Md. 435; *Commonwealth v. Taunton*, 7 Allen, 309; *Savannah v. State*, 4 Ga. 26; *Fall River Iron Works v. Old Colony R. R.*, 5 Allen, 221; *Springfield v. Connecticut R. R. Co.*, 4 Cush. 63.

<sup>4</sup> *Commonwealth v. Breed*, 4 Pick. 460; *Carter v. Bridge Proprietors*, 104 Mass. 236; *Illinois Packet Co. v. Peoria, etc., Co.*, 38 Ill. 467; *People v. Rensselaer, etc., Co.*, 15 Wend. 113; *People v. Kelly*, 76 N. Y. 475; *Hogg v. Zanesville, etc., Co.*, 5 Ohio, 410; *Spooner v. McConnell*, 1 McLean (C. C.), 337; *Palmer v. Cuyahoga Co.*, 3 McLean (C. C.), 226; *Cox v. State*, 3 Blackf. 193; *Williams v. Beardsley*, 2 Ind. 59; *Gbbons v. Ogden*, 9 Wheaton, 1; *Wilson v. Blackbird Creek, etc.*, 2 Peters, 245; *The Wheeling Bridge Case*, 13 How. 518; *Bridge Co. v. U. S.*, 105 U. S. 470; *Gilman v. Philadelphia*, 3 Wall. 713; *City of Chicago v. McGinn*,

The authority of the States is subordinate and subject to the right of the general government to control navigable streams, and as this is so, it must be true that the supreme and exclusive control is ultimately in the Federal Congress, for, if that body has authority over such streams, it must be a Federal power, and as such, supreme and exclusive, since a Federal power can not exist partly in Congress and partly in the State legislatures. If the power is not Federal, then Congress has no claim to it; if it is Federal, then the State legislatures can not possess it. There is some difficulty, as we have suggested, in reconciling the later decisions of the Supreme Court of the United States with the earlier; there is, indeed, no little difficulty in harmonizing the later decisions among themselves, for, as appears from the cases already cited, and from others,<sup>1</sup> it is held that as to navigable streams non-action by Congress permits action by the States, although Congress has the ultimate right of control, while in cases affecting interstate commerce, it is held that non-action by Congress will not authorize action by the States.<sup>2</sup> Perhaps the apparent conflict in the decisions may be reconciled upon the theory that the cases asserting the right of the Federal government over streams go no further than matters affecting the question of navigation solely, while the other cases are directed to the question of the regulation of commerce between the States.<sup>3</sup> But some of the expressions of the court in cases

51 Ill. 266; *Pumphrey v. Baltimore*, 47 Md. 145; *Bailey v. Philadelphia, etc.*, Co., 4 Harr. (Del.) 389, S. C. 44 Am. Dec. 539; *Hamilton v. Vicksburg, etc.*, Co., 34 La. Ann. 970; *Piscataqua Bridge v. New Hampshire Bridge*, 7 N. H. 35; *Att'y Gen. v. Stevens*, 1 Sax. Ch. N. J. 369, S. C. 22 Am. Dec. 526; *Wisconsin, etc.*, Co. v. *Manson*, 43 Wis. 255.

<sup>1</sup> *South Carolina v. Georgia*, 93 U. S. 4; *Transportation Co. v. Parkersburg*, 107 U. S. 691; *Clinton Bridge in re*, 10 Wall. 454.

<sup>2</sup> *State Freight Tax*, 15 Wall. 232; *Bowman v. Chicago, etc.*, Co., 125 U. S. 465-480. It is suggested in the opinions in these cases that the authority to regulate bridges and dams may

be considered as included in the police power.

<sup>3</sup> The decision in *Wilson v. Blackbird Marsh Co.*, 2 Peters, 245, is certainly irreconcilable with many of the later cases, and 's, indeed, much in conflict with the decision in the *Wheeling Bridge Case*, 13 How. 518. In *Escanaba v. Chicago*, 107 U. S. 678, it was said: "Until Congress acts on the subject, the power of the states over bridges across its navigable streams is plenary." See, also, *Cardwell v. Bridge Co.*, 113 U. S. 205. If, as some of the cases suggest, the authority to regulate bridges is a branch of the police power, it would seem to follow that it is exclusively a State power.



concerning navigable streams go much further and seem to claim for Congress the supreme and exclusive power for all purposes concerning commerce, and it is evident that there must be a reforming and straightening of the lines before a definite conclusion can be deduced from the cases.

It is proper to observe that what has been said as to navigable streams refers only to such as may be used for commerce between the States. If a stream is situated entirely within one State and forms no part of the system of interstate commerce it may be regulated and controlled by the State. The provisions of the Federal constitution do not extend to such streams.<sup>1</sup>

The person or corporation to whom the legislature grants the privilege of constructing a bridge across a navigable stream is not liable for a loss resulting from a temporary interference with, or obstruction of navigation, if due care, skill and diligence are used in the construction of the bridge.<sup>2</sup> There is a liability, however, if there is negligence resulting in unnecessarily delaying navigation, or in unnecessarily obstructing it. It is the duty of a corporation owning a bridge across a navigable stream to use due care and diligence to prevent injury to boats or vessels navigating the stream.<sup>3</sup> The privilege of navigation is a common right and is, in general, superior to other rights. It is a natural right, and is that to which all streams and lakes are primarily devoted. It results from these fundamental principles that the right is superior to that of corpora-

<sup>1</sup> *Sands v. Manistee River, etc., Co.*, 123 U. S. 288. In that case it was said: "The internal commerce of a State—that is, commerce which is wholly confined within its limits—is as much under its control as foreign or interstate commerce is under the control of the general government."

<sup>2</sup> *Hamilton v. Vicksburg, etc., Co.*, 119 U. S. 281; *Bennett v. City*, 14 La. Ann. 120; *Barben v. Police Jury*, 15 La. Ann. 559. In the case first named it was said: "The obstruction to the navigation of the stream during the progress of the work on the new bridge, therefore, afforded no ground of action.

The inconvenience was *damnum absque injuria*."

<sup>3</sup> *City of Boston v. Crowley*, 38 Fed. Rep. 402. It is quite clear that this is the rule as to bridges owned by private persons or corporations. *Mersy Docks v. Gibbs*, 11 H. L. Cases, 686; *Winch v. Conservators, etc.*, 9 L. R. C. P. 378. As to *quasi* public corporations the question is more difficult. The weight of authority at common law seems to be that they are not liable to a civil action, although the officers may be indicted. *Lee Conservancy Board*, 4 Exch. 116.

tions, or of the public, to construct bridges. The legislature or the Congress is the proper tribunal to settle conflicting rights respecting navigable streams,<sup>1</sup> and it may be doubted whether either body can totally destroy the natural right of navigation. Possibly the right may be destroyed under the police power, when the public welfare imperiously demands, but it would require a clear case to justify its destruction.<sup>2</sup> From the principles we have stated follows the result already declared, that one who builds a bridge across a navigable stream must use due care to prevent injury to those having a right to navigate it and who are exercising that right in a lawful and reasonably careful manner. Statutes conferring a right to erect bridges across navigable streams are to be construed liberally in favor of the primary right of navigation.<sup>3</sup> One who claims a right to build a bridge across a navigable stream must, in this country, show a valid statute conferring the right, but it is not necessary that the right should be conferred in express words, for, if the clear implication from the language employed is, that the statute was intended to confer such a right, it will be held to grant it.<sup>4</sup>

Persons, artificial or natural, who construct bridges and receive toll from those who use them are bound to use due care, skill and diligence to keep them in a reasonably safe condition for use by those who have a right to travel upon them. It was the rule at common law, that, in the absence of a statute, *quasi*

<sup>1</sup>Costello v. Landwehr, 28 Wis. 522; Scott v. Chicago, 1 Bissell, 510; Com. v. Essex Co., 13 Gray, 239; Middlesex, etc., R. R. Co. v. Wakefield, 103 Mass. 261. It is superior to ferry rights and to kindred rights. Steamboat Globe v. Kurtz, 4 G. Greene (Iowa), 433; Babcock v. Herbert, 3 Ala. 392; Milwaukee, etc., Co. v. The Gamecock, 23 Wis. 144.

<sup>2</sup>Passaic Bridge Cases, 3 Wall. 782; Pound v. Turck, 95 U. S. 459; Washington Bridge Co. v. State, 18 Conn. 53; State v. Eau Claire, 40 Wis. 533.

<sup>3</sup>State v. Freeport, 43 Me. 198; Attorney General v. Hudson River R. R., 9 N. J. Eq. 526; Hickock v. Hine, 23

Ohio St. 523; Dugan v. Bridge Co., 27 Pa. St. 303; Abraham v. Great Northern, etc., Co., 16 Q. B. 386; Stevens Point Boom Co. v. Reilly, 46 Wis. 237.

<sup>4</sup>Fall River Iron Works v. Old Colony R. R., 5 Allen, 221; Boston Water Power Co. v. Boston R. R., 23 Pick. 360; Costello v. Landwehr, 28 Wis. 522; Miller v. Prairie du Chien R. R., 34 Wis. 533; Saugaluck Bridge Co. v. Westport, 39 Conn. 337; Union Pacific R. R. v. Hall, 91 U. S. 343; Mohawk Bridge Co. v. Utica R. R., 6 Paige, 554; People v. Saratoga R. R. Co., 15 Wend. 130.

corporations were not liable at the suit of a private individual for failure to keep a bridge in repair unless toll was received, for the remedy was by indictment,<sup>1</sup> but this rule does not fully obtain in all the States as we shall hereafter more fully show. Bridges from which profit is derived by a private corporation, or by individuals, can not be said to be public bridges in the strict sense of the term, for there is in them a private proprietary right which could not exist if they were strictly public. They are in one sense public, for there is a common right to use them, but, after all, they are private property in the same sense that a railroad is, and they can not, therefore, be deemed public bridges in the same sense as is a bridge owned by the State itself, or by some of its instrumentalities as a county, city or township. We shall not consider a bridge owned by a private corporation as a public bridge, although there is a common right to use it upon the payment of toll.

The right to exact toll, even if exercised by a public corporation, was, under the common law rule, held to impose upon the corporation exercising the right of exacting toll the duty of using due care to keep its bridge reasonably safe for travel. The theory upon which the courts proceed in holding that where toll is received, the public corporation is liable, is, that the corporation having this right, derives a benefit in a private capacity as distinguished from its public rights and duties.<sup>2</sup> We

<sup>1</sup>*Russell v. Men of Devon*, 2 T. R. 607; *Hill v. Boston*, 122 Mass. 344; *Gordon v. Taunton*, 126 Mass. 349; *Barnes v. District of Columbia*, 91 U. S. 540; *Rowe v. Portsmouth*, 56 N. H. 291; *Rapho v. Moore*, 68 Pa. St. 404; *Cooper v. Athens*, 53 Ga. 638; *Aldrich v. Tripp*, 11 R. I. 145; *Chicago v. Dermody*, 61 Ill. 431; *Richmond v. Long*, 17 Gratt. 375.

<sup>2</sup>In the case of *Oliver v. Worcester*, 102 Mass. 489, the court, after stating the general rule that public corporations are not liable in the absence of a statute, said: "But this rule does not exempt towns and cities from the liability to which other corporations are subject

for negligence in managing or dealing with property rights held by them for their own advantage or emolument. Thus, where a special charter, accepted by a town or city or granted at its request, requires it to construct public works and enables it to assess the expense thereof upon those who are benefited thereby, or to derive benefit therefrom in its own corporate capacity for the use thereof, by way of tolls, or otherwise, the city is liable, as any other corporation would be, for any injury done to any person in the negligent exercise of the powers so conferred." This is a fair statement of the English rule, and the rule is recognized by

confess that we are unable to perceive a valid reason for this distinction. All property of a public corporation is subject to legislative control. All revenues are for the public benefit. No public corporation, as a public corporation, can have any purely private rights in bridges or streets. It is one of the instrumentalities of government, and, as such, exercises governmental powers, and no others, over bridges and highways within its limits. It holds all such property in trust for the public. Whether its revenue is derived from taxes levied for public purposes or from public property held for the public by it, as one of the governmental instrumentalities can, in principle, make no difference in this country, however it may be in England. If public corporations are liable at all in America, it is much more consistent with principle to hold them liable because they are charged with the performance of a duty, clothed with authority to perform that duty, and invested with the means of performing it, and this, as we shall have frequent occasion to say, is the rule with respect to cities, towns and villages as generally held by the American courts.

We leave the region of doubt when we come to consider bridges owned by private corporations, or individuals, for the use of which tolls are exacted. As to such bridges, there is no doubt as to the duty of the owners, whether imposed by positive statute or not, for it is well settled that such bridges must be kept reasonably safe for travel. Their owners are not warrantors or insurers, but they are bound to exercise ordinary care to keep them in a reasonably safe condition for passage.<sup>1</sup> The owners are not bound to build and maintain such a bridge as will support an unusual weight, as, for instance, such as will supply a safe passage for the cars of a street railway.<sup>2</sup> Nor are the bridge owners liable to one who overloads his wagon, or

American courts. *Henly v. Lyme*, 5 Bing. 91; *Weet v. Brockport*, 16 N. Y. 161, *n.*; *Eastman v. Meredith*, 36 N. H. 289; *Biglow v. Randolph*, 14 Gray, 543; *Child v. Boston*, 4 Allen, 41; *Thayer v. Boston*, 19 Pick. 511; *Pittsburg v. Grier*, 22 Pa. St. 54; *Aldrich v. Tripp*, 11 R. I. 141.

<sup>1</sup>*Frankfort Bridge Co. v. Williams*, 9 Dana, 403; *Orcutt v. Kitley Bridge Co.*, 53 Me. 500; *State v. Zanesville*, etc., 16 Ohio St. 308; *Stokes v. Tift*, 64 Ga. 312.

<sup>2</sup>*Monongahela Bridge Co. v. Pittsburgh, etc., Co.*, 114 Pa. St. 478.

loads it in an extraordinary manner.<sup>1</sup> This duty to make a reasonably safe bridge extends, of course, to the maintenance of the structure, for the duty does not end with the completion of the bridge.

Canal and railroad companies constructing bridges for their own use and convenience, must, where they intersect highways, use care, skill and diligence not to hinder travel on the highway or to make it unnecessarily hazardous. Due care requires that they should employ means to avoid the danger proportioned to its known character, or as it is reasonably indicated by the situation and surroundings.<sup>2</sup> A bridge so constructed as to be secure against ordinary freshets is sufficient,<sup>3</sup> but where a stream is subject to great floods, although they are of infrequent and unusual occurrence; it is the duty of the bridge owners to use due care to construct such a bridge as will withstand such floods.<sup>4</sup> Where an unusual freshet has occurred, which, it is reasonable to expect, may make the bridge unsafe, it is negligence on the part of the owners not to use care and diligence to inspect it before permitting the public to use it.<sup>5</sup>

When franchises are granted to a private corporation to construct canals and railroads, and such a corporation in constructing a canal or railroad makes a bridge necessary at the crossing of a highway, it becomes the duty of the corporation to erect the bridge so made necessary for the public use and convenience. The grant of the franchise is upon the implied condition that the public shall not be deprived of the use of the highway, and this imposes upon the person to whom the franchise is granted the duty not only of constructing, but also of maintaining, bridges, wherever they are necessary to enable the public to use the

<sup>1</sup> *Dexter v. Canton*, 79 Me. 463; *Clapp v. Town*, 3 N. Y. S. R. 516; *McCormick v. Washington*, 112 Pa. St. 185.

<sup>2</sup> *Manly v. St. Helen's Canal Co.*, 2 H. & N. 840; 27 L. J. Exch. 159; *Shoemaker v. Egerton*, 18 L. Times N. S. 389; *Rexford v. State*, 105 N. Y. 229.

<sup>3</sup> *Humphreys v. Armstrong*, 3 Brewster, 49.

<sup>4</sup> *Gray v. Harris*, 107 Mass. 492.

<sup>5</sup> *Louisville, etc., Co. v. Thompson*, 107 Ind. 442; *Hardy v. North Carolina, etc., Co.*, 74 N. C. 734; *Railroad Co. v. Holloren*, 53 Texas, 46, S. C. 37 Am. R. 744.

highway with safety.<sup>1</sup> This duty is an imperative one and its performance will be enforced by mandamus.<sup>2</sup> The duty to construct and maintain bridges is often prescribed by statute, but it needs no express statutory provision to create it, for it is a common law duty that may be enforced by the courts as an imperative one.<sup>3</sup> It was held in a very peculiar case that mandamus would not issue to compel the performance of the duty to bridge highway crossings where it was impossible for the corporation to perform the duty because of a want of funds not arising from any default on its part.<sup>4</sup> But the case just referred to must be deemed an exceptional one, for a private corporation which receives the grant of a franchise for its own benefit can not, as a general rule, escape the performance of a duty upon the ground of a lack of funds.<sup>5</sup>

A toll bridge erected under a legislative grant is in so far a highway that upon its abandonment by the owners the public may claim the right to maintain and use it if the local authorities so elect. A highway once legally established can not lose its character, if the public duly object, except by its extinguishment or vacation in due course of law. It is often said in the old books that "there can be no destruction of the public right at common law," and it is true that this right ceases only by force of statute.<sup>6</sup> If the corporation, in consideration of the grant of the franchise to gather tolls for a designated period, builds a bridge connecting with a system of public ways, the fair and just

<sup>1</sup>*Rex v. Kerrison*, 3 M. & S. 526; *Rex v. Inhabitants of County of Kent*, 13 East, 220; *Rex v. Inhabitants*, 14 East, 319; *Inhabitants v. Charlestown*, etc., R. R. Co., 7 Met. 70; *Wayne County, etc., Co. v. Berry*, 5 Ind. 286; *Board v. White Water, etc., Co.*, 2 Ind. 162; *White v. Quincy*, 97 Mass. 430; *Kearney v. L. B. & S. C. R. W. Co.*, 40 L. J. Q. B. 285.

<sup>2</sup>*Regina v. Wycomber R. R. Co.*, 8 B. & S. 259, L. R. 2 Q. B. 310; *Cambridge v. Charlestown, etc., Co.*, 7 Met. 70; *State v. Gorham*, 37 Me. 451; *Indianapolis, etc., Co. v. State*, 37 Ind. 489.

<sup>3</sup>*People v. Chicago, etc., Co.*, 67 Ill. 118.

<sup>4</sup>*The Bristol and Somerset R. R. Co., In re*, 3 Q. B. L. Div. 10.

<sup>5</sup>*Regina v. Eastern Counties Ry. Co.*, 10 A. & E. 351; *R. v. Luton, etc.*, 1 Q. B. 860; *Illingsworth v. Manchester, etc., R. R.*, 2 Railway Cases, 134; *Railway Co. v. Grand Junction, etc., Co.*, 1 Railway Cases, 224.

<sup>6</sup>*Fowler v. Saunders*, Cro. Jac. 446; *Wilkinson v. Bagshaw*, Peakes Add. Cases, 165; *Wood v. Quincy*, 11 Cush. 487; *Rex v. Ward*, Cro. Car. 266; *Read v. Leeds*, 19 Conn. 182; *Simmons v. Cornell*, 1 R. I. 519.

intendment is, that at the expiration of the time fixed by law the bridge shall remain for the public. Nor is there any injustice in this rule, for those who accept the franchise must know, as matter of law, that the bridge which once becomes a part of the system of highways so as to be necessary for the public convenience must so remain, although the period for reaping profit from it may have expired. It is, in truth, on this implied condition that such franchises are granted and accepted. So, too, the natural presumption is that a bridge shall remain, for it is a permanent structure and intended for a permanent use, and there is no valid reason for permitting its removal or destruction unless it is so provided by the statute. While it is true that the term "highway" does not always or necessarily include bridges, yet, when the question for solution involves the application of general rules common to all ways open for passage to the public, not as matter of sufferance or favor, but as of right, bridges must be included within its sweep, and this is true of the phase of the subject here under immediate discussion. The general rule is that "once a highway, always a highway," and within the term "highway" as used in this general rule bridges open to the public as of right on the payment of toll, are included.<sup>1</sup>

In many of the States the question of when and where it is expedient to build a bridge is left to the decision of the local authorities, and in such cases the courts can not control the exercise of the discretionary power vested in those authorities.<sup>2</sup> Nor will the court interfere by mandamus where the duty to rebuild is discretionary,<sup>3</sup> nor where the county has no funds with which to build.<sup>4</sup> But the lack of funds can not excuse the corporation if it has the means of securing them and neglects or re-

<sup>1</sup> The common law rule is that if a private citizen build a useful bridge at a proper place and the public use it, the county becomes bound to maintain it as a part of the highway. *King v. West Riding of Yorkshire*, 2 East, 342; *Rex v. Kent*, 2 M. & S. 513; *State v. Camp-ton*, 2 N. H. 513; *Board v. Washington Tp.* (Ind.), 23 N. E. Rep. 257.

<sup>2</sup> *Macon County v. People*, 121 Ill. 616; *Kankakee v. People*, 24 Ill. App. 410; *Hamilton Co. v. State*, 113 Ind. 179; 15 N. E. Rep. 258; *Travis v. Skinner* (Mich.), 40 N. W. Rep. 234.

<sup>3</sup> *State v. Board*, 113 Ind. 179.

<sup>4</sup> *State v. Wood*, 72 Wis. 629; *Hines v. Lockport*, 50 N. Y. 236; *Weed v. Ralston*, 76 N. Y. 329.

tuses to make them available. Where there is an imperative duty to repair or rebuild, mandamus will enforce its performance.<sup>1</sup> In cases where it is positively made the duty of the county officers to examine plans or take other action relative to matters concerning the construction of bridges, mandamus will lie to compel action,<sup>2</sup> but not to dictate what it shall be unless the statute imperatively provides what the action shall be.

If the county officers, or other officers of local subdivisions are invested with authority to determine the location of bridges, injunction will not lie to restrain them so long as they keep within the scope of their authority, do not trespass on private rights, nor act in bad faith, or oppressively. Where private rights of property are directly and wrongfully invaded, there can be no question as to the right to an injunction,<sup>3</sup> but where no private rights are violated it is more difficult to vindicate the right to restrain proceedings by the writ. The power to lay out and open highways generally carries the right to construct such bridges as are necessarily a part of the system of public ways,<sup>4</sup> but this is not so in jurisdictions in which there are two distinct systems wherein a difference is recognized between highways and bridges. It is, however, quite difficult to perceive how there can be a complete system of highways without bridges, for it is impossible to imagine a road of any considerable length that does not cross a brook, ditch, or some small stream of water; we are, therefore, persuaded that ordinarily a general authority to establish and maintain highways must include bridges across streams not navigable, although it may, perhaps, be otherwise as to navigable streams. The truth is,

<sup>1</sup> *State v. Bramwell* (Kansas), 18 Pacif. R. 952; *State v. Board*, 80 Ind. 478; *State v. Winterberg*, 80 Ind. 519; *Brander v. Chesterfield*, 5 Call. 548; *Richards v. County*, 120 Mass. 401; *Howe v. Commissioners*, 47 Pa. St. 361; *Harmam v. City*, 3 Met. (Ky.) 494.

<sup>2</sup> *Commissioners, etc., v. Board, etc.*, 39 Ohio St. 628.

<sup>3</sup> *Kyle v. Board*, 94 Ind. 115; *Quinton v. Burton, etc.*, 61 Iowa, 471; *McCord v. High*, 24 Iowa, 336.

<sup>4</sup> It was held in *State v. White* (R. I.), 40 Alb. L. J. 518, that the authority to repair a highway does not confer a right to build a new bridge, and it was said, "We think the building of a new bridge in a highway is something more than merely repairing a highway." The court cited *Cornell v. Vanartsdalen*, 4 Pa. St. 364; *Coal Oil Co. v. Richardson*, 63 Pa. St. 162, *Diamond v. Insurance Co.*, 4 Daly, 494.



that in each case the meaning of a statute must be sought by a study of its general scope and tenor, and a consideration of its purpose, for it can not be gathered from the consideration of one word, or of even many words.<sup>1</sup> Where there is such a general authority the matter of location must ordinarily be one solely for the judgment of the officers to whom the authority is granted.

Public corporations who build or control bridges under specific legislative authority have a qualified ownership in them; as to the public, they hold as trustees, but as to individuals, they have substantially the same rights as an individual has in property of a similar character. They may, in general, maintain such actions and suits as are necessary to protect the property from injury and to prevent its loss to the public. The ownership covers, as a general rule, the materials remaining after the bridge has been swept from its place by a flood. It has been held that where a canal company built a bridge partly for its own use and partly for the use of the public, the materials of the bridge remaining after it had been swept from its place, and after the abandonment of the canal, belonged to the county and did not pass to the purchaser of the canal under a decree of foreclosure.<sup>2</sup> Notorious and open use of a bridge by the public where its location and connections indicate that it forms part of the highway, is equivalent to possession by the public, and a purchaser of a bridge across a canal so situated and so used for a considerable period of time is chargeable with notice of the public right, although the bridge was built by the canal company and part of it was used by the company for its own convenience.<sup>3</sup>

At common law, no one could build a public bridge without authority from the government, but if such a bridge was built by an individual and adopted by the proper officers of a

<sup>1</sup>"One-half of the English language is interpreted by the text." Baron Alderson, in *Delevane v. Parker*, 9 Dowl. Pr. C. 245.

<sup>2</sup>*Shirk v. Board*, 106 Ind. 573. Bridges built to accommodate travel over highways are, in fact, part of the highway,

and the public can not be deprived of its highway. *City v. Shirk*, 88 Ind. 563. A highway bridge is not appurtenant to a canal. *Shirk v. Board*, *supra*; *St. Louis Bridge Co. v. Curtis*, 103 Ill. 410.

<sup>3</sup>*Shirk v. Board*, 106 Ind. 573.

governmental subdivision, it became, in the true and strict sense, a public bridge. If not adopted by the proper authority, such a bridge was deemed a nuisance.<sup>1</sup> In this country, and at the present time in England, bridges are built under legislative authority. This authority is frequently conferred in express terms, but it may be conferred by implication.<sup>2</sup> The rule of the common law was so strict that it would not permit an individual, not authorized by law, to build a bridge across a stream, although a highway led up to it on either side,<sup>3</sup> but in such a case it ought, in reason, to require very little evidence of adoption or acceptance to relieve the builder from liability to indictment as the author of a nuisance.

A toll bridge, as we have seen, can not be erected without legislative authority, but the authority to grant such a franchise may be delegated to a local governmental body.<sup>4</sup> The authority to confer such a corporate franchise is not, however, inherent in public corporations, but must be conferred by statute. When a private corporation has erected a toll bridge at a place where it is needed by the public, and will there be useful, a county having a general authority to construct bridges may purchase it for the public unless the statute forbids, but it is quite clear that a county, unless expressly authorized, can not buy a toll bridge located at a place where it would be of no practical benefit to the public.<sup>5</sup> Nor can a county buy a bridge simply to advance the interests of a private corporation, unless so authorized by a direct statute. County commissioners, unless

<sup>1</sup> *Payne v. Partridge*, 1 Salk. 12; *Rex v. Inhabitants*, 2 W. Blackt. 685; 5 Burr. 2597. Perhaps an exception to this rule exists where a man builds a bridge for his own convenience and the public use it, as, for instance, the owner of a mill who digs a mill race. 1 Ro. Abridg., title Bridges. *King v. Glamorgan*, 2 East, 496.

<sup>2</sup> *Queen v. Inhabitants*, 6 Mod. 307; *Beatty v. Titus*, 47 N. J. Law, 89; *Freeholders v. State*, 42 N. J. Law, 263; *Penn Tp. v. Perry Co.*, 78 Pa. St. 457; *Humphrey v. Armstrong Co.*, 56 Pa.

St. 204; *City of Eudora v. Miller*, 30 Kansas, 494; *Taylor v. Davis Co.*, 40 Iowa, 295; *Bell v. Foutch*, 21 Iowa, 119; *Long v. Boone Co.*, 32 Iowa, 181.

<sup>3</sup> *Smith v. Harkins*, 3 Iredell, Eq. (N. C.) 613, S. C. 44 Am. Dec. 83.

<sup>4</sup> *Clark v. City*, 19 Iowa, 199; *Colton v. Hanchett et al.*, 13 Ill. 615; *Chandler v. Montgomery Co.*, 31 Ark. 25.

<sup>5</sup> *Board v. Thompson et al.*, 106 Ind. 534; *Board v. Wright*, 106 Ind. 600; *Board v. Rushville, etc., Co.*, 87 Ind. 502.

forbidden, may, however, accept donations to aid in building bridges.<sup>1</sup>

It is unquestionably true that under a general grant of authority, county commissioners, or other governing bodies, have a wide discretion as to the location and mode of constructing bridges, and this makes it difficult to determine what will justify judicial interference. It is evident that courts have no right to interfere as long as there is good faith and no abuse or excess of authority, so that it would require a very strong case to justify the courts in assuming the power of reviewing the action of the local authorities in locating, purchasing, or constructing bridges. It may, however, be considered an abuse of discretion to purchase a toll bridge at a place where it could not be used, or where it would impose upon the county duties and obligations entirely different from those contemplated by law. Upon this ground the decisions referred to in the preceding note may be sustained, but, it must be said, they carry the doctrine to the utmost verge.

Whether a bridge is so connected with a common highway as to be necessary for public use, or whether it is of public utility are, in general, questions of fact.<sup>2</sup> Where the local authorities are invested with authority to decide such questions their decisions, when fairly made, are generally conclusive, except in cases where they are subject to review on appeal or *certiorari*. This is certainly the rule in analogous cases, and no reason is perceived why it should not prevail in cases concerning bridges. This rule as we have stated it is, indeed, substantially asserted in controversies concerning bridges under local control.<sup>3</sup>

The authority of county boards is limited to the county over which the law invests them with control and they can not direct the construction of bridges in another county, although their con-

<sup>1</sup> Bingham v. Board, 55 Ind. 113.

<sup>2</sup> Regina v. Inhabitants, 2 East, 342; State v. Northumberland, 44 N. H. 628.

<sup>3</sup> Macon Co. v. People, 121 Ill. 616; Kankakee v. People, 24 Ill. App. 410;

Browning v. City of Springfield, 17 Ill.

143; Bingham v. Board, 55 Ind. 113; Hamilton County v. State, 113 Ind. 179;

Travis v. Skinner (Mich.), 40 N. W. R. 234.

trol over bridges within their own county may be plenary.<sup>1</sup> Where there is no statute authorizing it, one county can not compel another to join in constructing a bridge across a stream which flows between the two counties.<sup>2</sup> It is, of course, competent for the legislature to provide the manner in which bridges between two counties, or two cities, shall be constructed and maintained, and this is often done.<sup>3</sup> Where the statute imposes upon one public corporation the duty of joining another in the construction of a bridge, and one of them, proceeding in all material respects in conformity to the statute, builds the bridge, and the other refuses to join in paying the expense of erecting the bridge, the one by whom the bridge was so constructed is entitled to reimbursement.<sup>4</sup> But to support a claim for reimbursement, the public corporation asserting the claim must show that the bridge was such as the law authorized it to construct, that it was the duty of the corporation of whom reimbursement is sought to join in constructing it, and that the proceeding has in all material particulars conformed to the statute.<sup>5</sup> The right asserted in such a case is a statutory one, and, under the familiar rule, it is incumbent upon the party who seeks to enforce such a right to affirmatively show a case within the statute and a substantial compliance with the statutory requirements. Such a claim is not one existing as of common right, but is one of statutory creation.<sup>6</sup>

At common law, the duty of repairing bridges rested upon

<sup>1</sup> The erection of a bridge within the limits of a county is a work for which county money may be legitimately expended, notwithstanding a constitutional provision inhibiting counties from engaging in works of internal improvements. *De Clerq v. Hager*, 12 Neb. 185. This decision is manifestly right, for it is difficult to conceive how anything could be more appropriately within the duty and power of a county.

<sup>2</sup> *Garrard Co. v. Boyle County Court*, 10 Bush. (Ky.) 208; *Brown v. Merrick Co.*, 18 Neb. 355; *Domnick v. Waltham, etc.*, 100 Ill. 631.

<sup>3</sup> *McHardy v. Corporation, etc.*, Prov. of Ont. 1 App. C. 629, S. C. 39 Q. B. 546; *Kendall v. County*, 12 Ill. App. 210; *State v. Canterbury*, 58 N. H. 195.

<sup>4</sup> *Pittsburgh v. Clarksville*, 58 N. H. 291. Where one public corporation acting upon an erroneous construction of the statute pays more than its share of the expense of repairing a bridge, it can not recover it from the other corporation. *Flynn v. Commissioners, etc.* (N. Y.), 22 N. E. R. 1109.

<sup>5</sup> *The Board v. Thompson et al.*, 106 Ind. 534.

<sup>6</sup> *Browning v. Board*, 44 Ind. 11.

the county in which the bridge was situated.<sup>1</sup> By that law it was declared that where a bridge was part in one shire and part in another both were bound to repair,<sup>2</sup> and this rule has been, by some of the courts of this country, applied to counties.<sup>3</sup> But, while the duty was adjudged an imperative one, it was held that a civil action could not be maintained, although a special injury was sustained, except in cases where the franchise of gathering tolls was granted to the governmental subdivision.<sup>4</sup> The rule of the common law imposing upon counties or hundreds the duty of repairing public bridges has not been sustained by many of the American courts, and the decisions of these courts are very decidedly opposed to the rule.<sup>5</sup>

In some of the States, notably the New England States, no public corporation, unless invested with the right to collect toll, is liable in a civil action for failure to keep bridges and highways in repair unless the liability is created by statute. In most of the States, however, a breach of the duty to repair is held to impose upon cities, towns, and incorporated villages, a liability for resulting damages, but, while this is held, most of the courts deny that there is any liability on the part of counties or townships.

It is, we confess, much more difficult for us to perceive how there can be any distinction between municipal corporations

<sup>1</sup> *Rex v. West Riding*, 5 Burr. 2594; *Rex v. Middlesex*, 3 B. & Ad. 201; *Regina v. Inhabitants*, 6 Mod. 307; *Rex v. Inhabitants*, 12 East, 192; *Rex v. Surrey*, 2 Camph. 455; *Commissioners v. Martin*, 4 Mich. 557, S. C. 69 Am. Dec. 333; *Hill v. Boston*, 122 Mass. 344; *Washer v. Bullett Co.*, 110 U. S. 558.

<sup>2</sup> *Woolrych on Ways*, 200; 1 *Hawks P. C.*, Ch. 77, § 2.

<sup>3</sup> *Rapho v. Moore*, 68 Pa. St. 404; *Washer v. Bullitt Co.*, 110 U. S. 558; *Agawam v. Hampden*, 130 Mass. 528.

<sup>4</sup> *Russell v. Men of Devon*, 2 Term R. 662; *Mackinnon v. Penson*, 25 Eng. Law & Eq. 457; *Riddle v. Proprietors*, etc., 7 Mass. 169; *Weightman v. City*

of Washington, 1 Black, 39; *Gilman v. Laconia*, 55 N. H. 130, S. C. 20 Am. Rep. 175; *Young v. Corm*, 2 Nott & Mc. (S. C.) 537; *Beardsley v. Smith*, 16 Conn. 375; *Mower v. Leicester*, 9 Mass. 247.

<sup>5</sup> Judge Dillon says: "The common law responsibility of counties to repair bridges has never prevailed in the United States." 2 *Dillon Munic. Corp.*, section 728*n*. The decisions sustain this statement. *Hedges v. Madison*, 1 Gil. (Ill.) 567; *Hill v. Livingston*, 12 N. Y. 52; *Huffman v. San Joaquin Co.*, 21 Cal. 426; *Mower v. Inhabitants*, 9 Mass. 247, S. C. 6 Am. Dec. 63; *Sawyer v. Northfield*, 7 Mass. 494; *Whitall v. Freeholders*, 40 N. J. Law. 302.

and counties respecting liability for defective bridges than it is to conceive a reason for denying a liability where there is no statute creating it. If it be granted that a public corporation, such as a city, is liable because it is charged with a public duty and invested with means to enable it to perform that duty, it is impossible, as it seems to us, for one who proceeds on principle to avoid the conclusion that a county charged with a specific duty and provided with the means of enforcing it is not likewise liable. Both are governmental corporations invested with authority over a designated locality, and what is the duty of one is, in its essential nature, the duty of the other, and if one is liable for a breach of duty, if we keep to principle, we must affirm that so, also, is the other.<sup>1</sup> The reason which influenced the judgment of the court in the case<sup>2</sup> on which the common law rule principally rests does not apply to counties charged with a duty and provided with means to enable them to perform it. The reason which gives that decision support is that there was no corporation provided by law with the means of performing the duty which, as the court asserted, undeniably rested upon the county, and as this reason fails when applied to counties invested with the means of performing that duty, so must the rule. But when it is considered that no action will lie against the State, and that public corporations are govern-

<sup>1</sup> Judge Dillon says: "It must be confessed that it is not easy to find solid legal grounds to sustain this distinction. To a limited extent, the same view has elsewhere been taken. It must be confessed that it is not easy to find a legal basis for the distinction between cities and counties to keep the streets and highways under their respective jurisdictions in repair, whereby the former are held to an implied civil liability for damages caused by the negligence of this duty, and the latter are held not to be thus liable. Discarding this distinction, the courts, in a few instances, have decided that counties and cities are equally free from implied civil liability in such cases." <sup>2</sup> Dillon's Munic. Corp.

(3d ed.), section 998. The ground upon which counties are held liable is not simply implied, for, it is the inevitable result of the principle that where there is a clear legal duty and a negligent breach, one who sustains a special injury has a right to damages. Judge Thompson strongly presents this view of the question. <sup>1</sup> Thompson on Negligence, 618.

<sup>2</sup> Russell v. Men of Devon, 2 Term R. 662. In speaking of the action which the statute of Winton gave against the hundred, Lord Kenyon said: "And when they gave the action they virtually gave the means of maintaining that action."

mental instrumentalities—a city just as essentially so as a county<sup>1</sup>—it is exceedingly difficult to conceive any valid reason upon which it can be held that either is liable where there is no statute creating such liability. The people constitute the corporation, whether it be a county or a city, and they are part of the sovereigns of the State, and it is a departure from principle to hold a governmental agency liable unless it is expressly made liable by statute,<sup>2</sup> but if one subdivision is liable, so must be another where the law charges both with a specific duty and supplies both with the means of performing that duty. The courts which hold that both of such subdivisions are liable are at least consistent, if nothing more.

Some of the courts do hold that counties are liable where they are charged with a specific duty, and provided with the means of enforcing it, for a negligent breach of the duty,<sup>3</sup> but the very decided weight of authority is that there is no liability unless it is created by statute.<sup>4</sup> Some of the courts, notwith-

<sup>1</sup>In *Henderson v. Covington*, 14 Bush. 312, the court said of municipal corporations: "They are agencies of the sovereign, to whom certain powers are delegated because they can safely be confided to, and can be more intelligently and advantageously exercised by, a local magistracy than by the sovereign power in the State."

<sup>2</sup>*Detroit v. Blakeby*, 21 Mich. 84; *Navasota v. Pearce*, 46 Texas, 525.

<sup>3</sup>*County v. Wise* (Md.), 18 Atl. R. 31; *Mayor v. Marriott*, 9 Md. 160; *Mayor v. Pendleton*, 15 Md. 12; *Flynn v. Canton Co.*, 40 Md. 313; S. C. 17 Am. R. 603; *County Commissioners v. Baker*, 44 Md. 1; *House v. Board*, 60 Ind. 580; *Pritchett v. Board*, 62 Ind. 210; *Board v. Arnett*, 116 Ind. 438; *Harris v. Board* (Ind.), 23 N. E. Rep. 92; *Carey v. Tama Co.* (Iowa), 37 N. W. R. 138; *Huff v. Poweshiek Co.*, 60 Iowa, 529; *Cooper v. Mills Co.*, 69 Iowa, 350; *Trustees v. Gibbs*, L. R., 1 H. L. 93; *Mahaney v. Scholly*, 84 Pa. St. 136; *Eastman v. Clackamas Co.*, 32 Fed. Rep. 24. The opinion in the case last

named discusses the question with ability and force, and its reasoning is not easily answered.

<sup>4</sup>*White v. Chowan*, 90 N. C. 437, S. C. 47 Am. R. 534; *Clark v. Adair*, 79 Mo. 526; *Marion Co. v. Riggs*, 26 Kansas, 255; *Crowell v. Sonoma Co.*, 25 Cal. 313; *Freeholders v. Strader*, 3 Harr. (N. J.) 108, S. C. 35 Am. Dec. 530; *Cooley v. Chosen Freeholders*, 27 N. J. Law, 415; *Hill v. Boston*, 122 Mass. 344; *Com'rs of Highways v. Martin*, 4 Mich. 557; *White v. County of Bond*, 58 Ill. 297; *Greene Co. v. Eubanks*, 80 Ala. 204; *Barbour County v. Brinson*, 36 Ala. 362; *Askew v. Hale County*, 54 Ala. 639. The cases which hold counties not liable, declare that they are *quasi* corporations, and therefore not to be held to the same responsibility as a town or city; but in view of the fact that counties are generally as completely organized as cities or towns and are invested with powers as effective, it is difficult to vindicate the doctrine asserted.

standing their denial of the general doctrine, hold that a failure to comply with a statute, as, for instance, by failing to take a bond from a contractor, will make the county liable. Thus, it has been held, that where the county commissioners are required to take a bond from the contractor who constructs the bridge, the county will be liable if the commissioners fail to exact the required bond.<sup>1</sup> This doctrine is modified by another case which holds that the liability of the county does not extend beyond the time which the bond of the contractor, had it been given, would have covered.<sup>2</sup>

Where the county is under a legal duty to keep a bridge reasonably safe it will be held answerable for a negligent failure to exercise ordinary care to ascertain and provide against the action of time and the elements upon the materials of which the bridge is constructed. Due care requires that the local officers should take notice of the tendency of timber to decay, and a failure to exercise such care may constitute actionable negligence.<sup>3</sup>

The foundation of the doctrine, which many of the courts assert, that a county is liable for a negligent breach of duty is that it is charged by law with the duty of maintaining bridges and invested with the means of performing the duty, and where there is no law imposing the duty upon the county there can be no liability. It has accordingly been justly held that a county is liable for the class of bridges, only, which the statute requires or authorizes it to build and maintain.<sup>4</sup> Unless the bridge is such as the statute makes it the duty of the county to repair there is no liability.

<sup>1</sup> *Greene Co. v. Eubanks*, 80 Ala. 204; *Arnold v. Henry County* (Ga.), 8 S. E. Rep. 606; *Lee Co. v. Yarborough* (Ala.), 5 S. E. Rep. 344. But, it is held, the county is not liable for injury to a stray horse. *Lee Co. v. Yarborough*, *supra*.

<sup>2</sup> *Monroe Co. v. Flint* (Ga.), 6 S. E. 173. But it is held in another case, that if the commissioners suffer the bond to expire before the time limited by law, the county will be liable. *Davis v. Horne*, 64 Ga. 69.

<sup>3</sup> *Rapho v. Moore*, 68 Pa. St. 404, S. C. 8 Am. R. 202; *Board v. Legg*, 110 Ind. 479; *Board v. Legg*, 93 Ind. 523, S. C. 47 Am. R. 390; *Fort Wayne v. Combs*, 107 Ind. 75.

<sup>4</sup> *Taylor v. Davis Co.*, 40 Iowa, 295; *Moreland v. Mitchell Co.*, 40 Iowa, 394; *Long v. Boone Co.*, 33 Iowa, 181; *Regina v. Inhabitants*, 14 Eng. L. & E. 116; *Board of Com'rs v. Bailey*, Sup. Ct. Ind., MSS. opin. Jan 31, 1890.



In some of the States townships are charged with the duty of maintaining bridges, provided with means for performing this duty, and held liable for a negligent breach of such duty.<sup>1</sup> This doctrine can not prevail where the township is not invested with authority to procure funds for building and maintaining bridges, since its chief support is the fact that the county has at its command the means of performing the duty imposed upon it.<sup>2</sup> A corporation without means to perform a duty is within the rule declared by the English cases, and can not be within the prevailing American rule, for, as to such a corporation, the reason of the rule completely fails.

Municipal corporations, such as cities, towns and incorporated villages, are generally held to be under a duty to construct bridges built by them, so that they shall be reasonably safe for passage, and to so maintain such bridges, and those under their dominion no matter by whom they were originally constructed, as that they shall be reasonably safe for travel by one who uses ordinary prudence and care. By bridges under the dominion of municipal corporations we mean such as they have full control over and for the maintenance of which they may rightfully use the corporate funds. It results that if there is a legal duty the negligent breach of it renders the wrong-doing corporation liable to an action to one who sustains a special injury. In those jurisdictions which do not recognize the New England rule there can be no question that if there is a liability respecting streets, so, also, must there be a liability for defective bridges. The basis of municipal liability for defective bridges is essentially the same as that respecting streets; the corporate responsibility is commensurate with the corporate duty and power. Public corporations are not insurers of the safety of their bridges, and consequently are not liable, although a bridge be in fact unsafe, unless its unsafety is attributable to their negligence.

It is an indefensible departure from sound principle to hold municipal corporations liable for the unsafe condition of bridges belonging to private corporations, or for bridges which it is the

<sup>1</sup> *Stebbins v. Keene*, 55 Mich. 552; *maugh Tp. (Pa.)*, 2 Cent. Rep. 361, S. Moore *v. Kenockee Tp. (Mich.)*, 42 N. C. 5 Atl. Rep. 45.

*W. Rep.* 944; *Zimmerman v. Cone*—<sup>2</sup> *Yeager v. Tippecanoe Tp.*, 81 Ind. 46.

duty of private corporations to maintain. The grant of authority over streets and bridges does not imply that the municipality shall have charge of, or be liable for, the unsafe condition of a bridge not under its control as a bridge belonging to the local public.<sup>1</sup> The doctrine of municipal liability for defective bridges can not be extended to bridges over which the corporation does not have full control, and for the maintenance of which it is not authorized to raise money, for the chief support the doctrine of municipal liability has, slender enough at best, is that it has at its command funds with which to make the bridge safe, and this is not true in regard to bridges owned by private corporations. Nor can it be said with any tinge of justice that cities are chargeable with the duty of maintaining bridges owned by a county or a township, since city funds can not be applied to the maintenance of such bridges. Nor are the officers chosen to represent cities the representatives of the public corporation which owns the bridge.<sup>2</sup> Such bridges may, however, form part of the municipal streets and when this is true it may be that it becomes the duty of the municipality to exercise ordinary care to maintain them in a reasonably safe condition for travel, but this duty can only arise when the bridges form part of the streets of the city and are so used.<sup>3</sup> It is an ancient rule, and a sound one, that to charge a person for negligence respecting a public work, the law must have imposed upon him a duty so as to make that neglect culpable.<sup>4</sup> The duty which lies at the foundation of actionable negligence can not be justly said to rest upon a municipal corporation in respect to bridges

<sup>1</sup> *Lowrey v. City of Delphi*, 55 Ind. 250, is, in so far as it asserts a liability against the city for the unsafe condition of the canal company's bridges, erroneously decided, and is in direct conflict with the sound and reasonable doctrine declared in the case of *The Common Council of Indianapolis v. McClure*, 2 Ind. 147. See, also, *Board v. Washington Township* (Ind.), 23 N. E. Rep. 257.

<sup>2</sup> *Board v. Washington Township* (Ind.), 23 N. E. Rep. 257.

<sup>3</sup> *City of Goshen v. Myers*, 119 Ind. 196; *Board v. Deprez*, 87 Ind. 508; *Corporation, etc.*, 3 R. L. Q. B. (Canada), 451; *Eudora v. Miller*, 30 Kan. 494; *Schomer v. Rochester*, 15 Abb. N. C. (N. Y.) 57; *Hyatt v. Rondout*, 44 Barb. 385.

<sup>4</sup> *Esp. Nisi Prius*, 365; *Mayor, etc., v. Henly*, 3 Barn. & Ad. 77.

owned or controlled by another governmental corporation.<sup>1</sup> Nor can a county be liable for a bridge within the limits of a town or city if the bridge is under the control of the city or town, although it may have been originally constructed by the county; but if the county remains the owner of the bridge, it is responsible for a negligent failure to keep it in repair.<sup>2</sup> Where a city takes charge of a bridge and asserts control and ownership over it, there is sufficient reason for holding it bound to keep the bridge in repair.<sup>3</sup> The reason is found in the ancient and settled doctrine that a public corporation may by adoption so far make a bridge its own as to become charged with the duty of using ordinary care to keep it in a reasonably safe condition for travel.<sup>4</sup>

A city may be liable for a failure to keep a bridge in repair which forms part of one of its streets, although the county may have joined with it in the purchase of the bridge.<sup>5</sup> If two corporations are charged with the joint duty of maintaining a bridge, it would seem, under the familiar rule, that one of several joint wrong-doers may be sued alone, that the plaintiff may elect to sue one or both; but it has been held that where two villages are charged with the duty of maintaining a bridge, each is responsible for the maintenance of its side of the structure.<sup>6</sup> Principle

<sup>1</sup> *Carpenter v. City of Cohoes*, 81 N. Y. 21, S. C. 37 Am. R. 468; *Veeder v. Little Falls*, 100 N. Y. 343; *Indianapolis v. McClure*, 2 Ind. 147; *Board v. Washington Tp. (Ind.)*, 23 N. E. Rep. 257; *Bishop v. Centralia*, 49 Wis. 669.

<sup>2</sup> *Eyler v. County Commissioners*, 49 Md. 257, S. C. 33 Am. Rep. 249. The court decides in this case that a canal company which crosses a highway must bridge it when public necessity requires, and cites *Northern, etc., Co. v. Mayor*, 46 Md. 425, but holds the county liable for failure to repair, because, as it said, that duty rests primarily on the county. It is not altogether clear that the ultimate conclusion reached by the court is correct, although the decision is placed upon a somewhat peculiar statute.

<sup>3</sup> *Sewall v. City of Cohoes*, 75 N. Y. 45, S. C. 31 Am. R. 418; *Hord v. Village*, 26 Ill. App. 41.

<sup>4</sup> *State, ex rel., v. Demaree*, 80 Ind. 519; *State v. Town of Campton*, 2 N. H. 513; *Watson v. Proprietors, etc.*, 14 Me. 201; *Rex v. West Riding*, 5 Burr. 2594; *Regina v. Wilks*, 3 Salk. 381; *Rex v. Lancashire*, 2 B. & Ad. 313; *Rex v. Kent*, 2 Maule & S. 313; *Rex v. Yorkshire West Riding*, 2 East, 342.

<sup>5</sup> *Shawnee Co. v. Topeka*, 39 Kansas, 197; *Hawthurst v. New York*, 43 Hun. 588.

<sup>6</sup> *Village v. Howland*, 124 Ill. 547. In *Lyman v. Hampshire*, 140 Mass. 311, this question was argued but not decided, the court holding that the question of non-joinder was not before it as there was no plea in abatement.

seems to condemn this doctrine, and it is quite difficult to perceive how it can be given just practical effect, since it may often be beyond the power of the plaintiff to determine just which party should be sued.

A public corporation having a general authority to construct bridges must exercise it with due regard to the rights of others, and must employ ordinary care and skill to prevent injury to other property. It has no right to unnecessarily obstruct the flow of water,<sup>1</sup> nor to injure mill privileges or other property.<sup>2</sup> But where there is authority to construct a bridge and due care and diligence are exercised in its erection the corporation will not be responsible for purely consequential damages. The principle involved in such cases is the same as that which prevails in cases of the improvement of streets, for where public officers engaged in the performance of a public duty exercise, with care, skill, and diligence, the authority conferred upon them, neither they, nor the corporation which they represent, will be liable in damages except where a statute expressly creates a liability. If, however, there is a lack of reasonable care and skill, the corporation will, under the prevailing rule, be liable to one who sustains a special injury. The care required is not extraordinary in degree, but is what is usually termed "ordinary care" or reasonable care. What is ordinary care in one case may be negligence in another, for the care must be such as the situation and circumstances demand.

A bridge must be constructed with reference to the stream it crosses, and reasonable care must be exercised to so construct it that it shall be sufficient as against freshets which may be apprehended, and so as not to do unnecessary injury to other property when such freshets do occur. It is the duty of the corporate officers to exercise reasonable care to make themselves acquainted with the history of the stream and to acquire a knowledge of the location and its surroundings, and they must also make a proper use and application of the knowledge and information so acquired. The corporate authorities are

<sup>1</sup> *Lawrence v. Inhabitants*, 5 Gray, 110. Gray, 544, S. C. 66 Am. Dec. 431; *Spencer v. Hartford, etc., Co.*, 10 R. I. 14.

<sup>2</sup> *Perry v. City of Worcester*, 6

not bound to take precautions against extraordinary and unprecedented floods, but they must provide against such as may be reasonably expected to occur, although they may not be of frequent occurrence.<sup>1</sup> The general doctrine is that a corporation is not liable for an injury produced by a violent and unprecedented storm, and it can hardly be said with justice, that because an extraordinary storm has once visited a locality that it will again visit it.<sup>2</sup> Much, indeed, must depend upon the frequency with which great storms or freshets have visited the particular locality. Where the freshet or storm can be considered as "an act of God," within the meaning affixed to that phrase by the law, there is no liability.<sup>3</sup>

The authority to build a bridge necessarily carries with it the right to do all such work as is essential to construct a structure of the character and dimensions demanded by the public necessity and convenience,<sup>4</sup> but the right must be exercised with care and skill and with reasonable regard to the rights of others. The authority to construct a bridge implies that it shall be constructed in the usual mode, but much is necessarily left to the

<sup>1</sup> *Allen v. City of Chippewa Falls*, 52 Wis. 430, S. C. 38 Am. R. 748; *City of Evansville v. Decker*, 84 Ind. 325, 328; *Ross v. City of Madison*, 1 Ind. 281; *Louisville, etc., Co. v. Thompson*, 107 Ind. 442; *Smith v. Margrave*, 2 App. Cases, 781; 43 L. J. Ex. 70; *Blythe v. Birmingham*, 11 Exch. 781. In the following cases the storms and freshets were held to be extraordinary and unprecedented. *Withers v. North Kent*, 3 H. & N. 969; *International, etc., Co. v. Halloran*, 53 Tex. 46, S. C. 37 Am. R. 744; *Gillespie, etc., Co. v. St. Louis, etc., Co.*, 6 Mo. App. 554; *Lapham v. Curtis*, 5 Vt. 371; *China v. Southwick*, 12 Me. 238; *Shrewsbury v. Smith*, 12 Cush. 177; *Oakham v. Holbrook*, 11 Cush. 299; *Wendell v. Pratt*, 12 Allen, 464; *Bell v. McClintock*, 9 Watts, 119; *Richardson v. Kier*, 34 Cal. 64; *Campbell v. Bear River Co.*, 35 Cal. 679; *Morris Canal Co. v. Ryerson*, 27 N. J. L. 457; *Kansas, etc., Co. v. Miller*, 2

Col. 442. Floods which are known to occur at wide and irregular intervals are regarded as ordinary floods against which provision should be made. *Gray v. Harris*, 107 Mass. 492; *Dorman v. Ames*, 12 Minn. 451.

<sup>2</sup> *Flori v. City of St. Louis*, 69 Mo. 341, S. C. 18 Am. Rep. 504; *Pittsburgh, etc., Co. v. Gilleland*, 56 Pa. St. 445; *Livezey v. Philadelphia*, 64 Pa. St. 106, S. C. 3 Am. R. 578; *Ellet v. St. Louis, etc., Co.*, 76 Mo. 518; *Nashville, etc., Co. v. David*, 6 Heisk. 261, S. C. 19 Am. R. 594; *Lehigh Bridge Co. v. Lehigh*, 4 Rawle, 24; *Froster v. Juniata Bridge Co.*, 4 Har. (Pa.) 393.

<sup>3</sup> An interesting discussion of the general question will be found in *Chicago, etc., Co. v. Sawyer*, 69 Ill. 285, and in the notes in 18 Am. Rep. 618.

<sup>4</sup> *Clarke v. Birmingham, etc., Co.*, 41 Pa. St. 147; *The Modoc*, 26 Fed. R. 718; *Evans v. North Side, etc., Co.*, 26 Fed. R. 718.

discretion of the officers upon whom the authority is conferred. If, however, the statute specifically provides the mode in which bridges shall be constructed, it is the duty of those to whom the authority is granted to conform to the statutory requirements in all material respects, for a substantial departure from the statute will constitute the corporation a wrong-doer.<sup>1</sup> It is the duty of a corporation engaged in erecting a bridge to use reasonable care and skill to provide proper signals, warnings or guards to prevent injury to boats using the stream and to persons traveling along the road or street.<sup>2</sup> The cases which define the duty of corporations that make excavations in roads or streets assert the principle which governs cases of corporations engaged in building bridges, for the cases are of the same class with essentially the same marks and features.

The municipal corporation charged with the care and control of a public bridge is, as we have said, bound to use reasonable care and skill to keep it in a safe condition for ordinary travel.<sup>3</sup> Whatever is required to make it safe for use by a traveler exercising ordinary care the municipality must provide, but it is often a question of fact as to whether the bridge is so maintained as to free the corporation from the charge of negligence.<sup>4</sup>

The duty to maintain a bridge in a safe condition requires that ordinary care be used to keep the bridge in such a condition as that it can be crossed safely by persons traveling in the

<sup>1</sup> *Attorney Gen. v. Bridge Co.*, 20 Grant (U. C.), 34; *Attorney Gen. v. Mid. Kent, etc.*, Law R. 3 Ch. 100. A substantial compliance with the statute is sufficient. *Regina v. Great Western, etc., Co.* (Prov. Ont.), 12 Q. B. 250; *Ward v. Great Western, etc., Co.* (Prov. Ont.), 13 Q. B. 315.

<sup>2</sup> *Mullen v. Town of Rutland*, 55 Vt. 77; *The Modoc*, 26 Fed. R. 718. In the case last cited the court held both parties in fault, and, applying the maritime rule, held that the damages should be divided.

<sup>3</sup> *Jordan v. City of Hannibal*, 87 Mo.

673; *Board v. Deprez*, 87 Ind. 509; *McDonald v. Corporation, etc.*, 29 C. P. (Canada), 249; *Hyatt v. Rondout*, 44 Barb. 385; *Tift v. Towns*, 53 Ga. 47; *City of Joliet v. Verly*, 35 Ill. 58; *Medina v. Perkins*, 48 Mich. 67; *City of Denver v. Dunmore*, 7 Col. 328. There must be a special injury. *Daniels v. City of Denver*, 2 Col. 669.

<sup>4</sup> *Dale v. Webster County* (Iowa), 41 N. W. Rep. 1; *Moreland v. Mitchell Co.*, 40 Iowa, 394; *Zimmerman v. Cone-maugh Tp.* (Pa.), 2 Cent. R. 361, S. C. 5 Atl. R. 45.

ordinary mode, and by vehicles carrying ordinary loads. There is no liability where the vehicle is overloaded or loaded in an extraordinary mode.<sup>1</sup> Where, however, the bridge is originally built strong enough to support a designated weight, it must not be weakened so as to destroy its capacity to carry such a load by changes or repairs.<sup>2</sup>

The law requires that the governmental corporation owning or controlling a bridge shall exercise a reasonable supervision over it, and cause such inspections to be made as ordinary care and diligence require.<sup>3</sup> If a bridge is suffered to remain out of repair for such a length of time as to make it negligence on the part of the corporation not to have knowledge of its condition there is such a breach of duty as will render the corporation liable.<sup>4</sup> The rule upon this subject is the same as that which prevails in respect to defects in roads and streets, for if there be constructive notice there is negligence. It is true of counties that more time ought to be allowed in which to ascertain the unsafe condition of a bridge than should be allowed towns or cities, for the means of obtaining knowledge are not so efficient as in the case of cities, and the county officers are charged with duties covering a much larger and much more sparsely settled territory than that of a town or city, so that it would not be just to deal with them as strictly as with town or city officers.

If the unsafe condition of the bridge is owing to negligence in its construction, then no notice of its dangerous condition is required.<sup>5</sup> There is a breach of duty at the outset in such a case which completely fastens a liability upon the wrong-doing corporation. Notice is essential only when the unsafe condition of the bridge arises from the act of a wrong-doer or from

<sup>1</sup> McCormick v. Washington Tp., 112 Pa. St. 185.

<sup>2</sup> Stebbins v. Keene, 60 Mich. 214. A public corporation is not bound to foresee or provide against extraordinary occurrences, and upon this principle rests the doctrine that it is not bound to place a railing along a footway in a bridge to protect pedestrians from injury by horses running away. Lehigh

County v. Hoffort, 116 Pa. St. 119, S. C. 2 Am. St. R. 587.

<sup>3</sup> Board v. Legg, 110 Ind. 479.

<sup>4</sup> Ford v. Umatilla Co. (Oregon), 16 Pac. 33; Zimmerman v. Conemaugh Tp. (Pa.), 2 Cent. R. 361, S. C. 5 Atl. R. 45; Board v. Bacon, 96 Ind. 31; Board v. Dombke, 94 Ind. 72.

<sup>5</sup> Board of Com. of Wabash County v. Pearson, 120 Ind. 426, S. C. 22 N. E. R. 134; Board v. Bacon, 96 Ind. 321.

some cause subsequent to its erection. It is the duty of the corporation to exercise reasonable care and diligence to secure competent and skillful persons to build or repair a bridge, and if it knowingly employs incompetent persons it will be liable in damages to one who, without contributory fault on his part, sustains a special injury.<sup>1</sup> To warrant a recovery the plaintiff must show that the negligence of the corporation was the proximate cause of his injury; it is not enough to show that he did sustain an injury, and that the bridge was, in fact, defective or unsafe, for these facts must be supplemented by evidence of negligence.<sup>2</sup>

Where a statute creates a liability for a failure to repair, the courts are inclined to require the plaintiff to bring his case fully within the terms of the statute, and to deny a recovery, although there may be negligence, in cases where the duty to repair has been so performed as to make the bridge safe for passage. Thus it has been held that where the keeper of a bridge negligently beckoned to a traveler to drive on the bridge, and the traveler obeyed the signal and was caught by the draw, there could be no recovery.<sup>3</sup> In other cases it has been held that if the bridge is so constructed as to frighten horses, or is suffered to become so out of repair as to produce that effect, there is no liability.<sup>4</sup> The theory upon which these decisions proceed is that the liability is a purely statutory one, and is not to be extended beyond the terms of the statute, but it seems that where the question is as to the liability of a town or city, the rule can not be so strict in jurisdictions where the principle prevails that the liability is commensurate with the power and duty.

The rule generally recognized is that a traveler whose negligence proximately contributes to his injury can not recover, although the public corporation owning the bridge may have

<sup>1</sup> Board of Com. of Wabash Co. v. E. Rep. 113; French v. Boston, 129 Pearson, *supra*. Mass. 592; McDougall v. Salem, 110

<sup>2</sup> Harris v. The Board (Ind.), S. C. 23 Mass. 21; Nowell v. Wright, 3 Allen, N. E. R. 92; Board v. Dombe, 94 Ind. 166.

<sup>3</sup> 72. <sup>4</sup> Acker v. Anderson, 20 So. Car. 495;

<sup>5</sup> Butterfield v. Boston (Mass.), 20 N. Fulton Co. v. Rickel, 106 Ind. 501.



been guilty of a negligent breach of duty.<sup>1</sup> There is no difference in regard to this phase of the question, so far as towns, cities and incorporated villages are concerned, between cases where the negligence of the corporation occurs in the care of streets and those where it respects bridges.

<sup>1</sup> Dale *v.* Webster County (Iowa), 41 N. W. Rep. 1; Morrison *v.* Board, 116 Ind. 431, S. C. 19 N. E. 316; Monongahela Bridge Co. *v.* Bevard (Pa.), 11 Atl. Rep. 575; Gulf, etc., Co. *v.* Gascamp (Texas), 7 S. W. Rep. 227.

## CHAPTER IV.

### TURNPIKES.

By virtue of the right which John Stuart Mill says all authors have to define a word which they use, we define the word "turnpikes" to mean all roads owned by private corporations or individuals over which the public have a common right of passage upon the payment of toll. Of whatever material such a road is constructed we shall regard it as a turnpike. In thus employing the word, we do not depart from the general usage,<sup>1</sup> and we do promote clearness and brevity. Our definition is intended to exclude what we have designated as public roads and streets.

A turnpike, then, is a road constructed and maintained by a private corporation or by individuals, under authority of law, with the right to gather toll from those who travel upon it, and it is the franchise of gathering toll which impresses it with its essential characteristics.<sup>2</sup> It is a highway, notwithstanding the fact that the beneficial interest in the form of tolls is in the private corporation or company. Its character as a highway for travel is not, in contemplation of law, affected by the fact that all who use it may be compelled to pay toll. It is the theory of the authorities that tolls are allowed the turnpike company to reimburse it for constructing and keeping the road in repair for safe and convenient use, and that tolls are the equivalent of taxes.<sup>3</sup> It is the duty of the citizens to maintain the road, and in compelling the performance of this duty by authorizing the turnpike

<sup>1</sup> *State v. Haight*, 30 N. J. Law, 448; *v. E. & W. Dock Co.*, 22 Eng. Law & Eq. 113; *Craig v. People*, 47 Ill. 487; *Hayward v. Mayor*, 8 Barb. 492.

<sup>2</sup> *Haight v. State*, 32 N. J. Law, 451; *Fort Edward, etc., Co. v. Payne*, 17 Neff v. Mooresville, etc., Co., 66 Ind. Barb. 567. But see, *Seneca Road Co. v. Auburn, etc., Co.*, 5 Hill, 170; *Buncombe Turnpike Co. v. Baxter*, 10 Ired. 222.

<sup>3</sup> *Northern Bridge, etc., Co. v. London, etc., Co.*, 6 M. & W. 428; *Regina*

company to collect toll, the legislature simply changes the method of collecting from the citizens the expense of maintaining the road and does not, so it is adjudged, impose upon them any additional burden.<sup>1</sup>

If the corporation owning the turnpike suffers it to get out of repair, the corporate franchises may be forfeited to the State, and in that event the road will become a public way of the governmental corporation or body having control of roads of like character.<sup>2</sup> This result will follow if the road is abandoned by the private corporation. It has been held that if the private corporation owns the fee of the land on which the way exists, the public does not acquire a right to the use of the highway upon the expiration of the charter of the corporation.<sup>3</sup> It is doubtful whether the doctrine of this case can be sustained. It is an old maxim that, "once a highway always a highway," and it may justly be held that it applies as well against private corporations as against individual land owners. A corporation accepting a charter authorizing the construction of a public highway ought to be held to take the franchise granted, upon the condition that on the dissolution of the corporation the road shall remain open to the public. The right to take tolls for the specified period should be deemed to be all the benefit that the corporation was authorized to receive, and, having received this, there should be no right to close the road against the public travel.<sup>4</sup> Certainly this should be so where the public have built roads connecting with the turnpike and individuals have acquired rights on the faith that there is a permanent highway. There is no more reason for allowing a turnpike corporation to close a highway against the public than there is for allowing an in-

<sup>1</sup>Commonwealth *v.* Wilkinson, 16 Pick. 175, S. C. 26 Am. Dec. 654; Walker *v.* Caywood, 31 N. Y. 51; Benedict *v.* Goit, 3 Barb. 459; Plank Road Co. *v.* Thomas, 8 Harris, 91; Turnp. Road *v.* Brosi, 10 *Id.* 29; Clarkville, etc., Turnp. Co. *v.* Atkinson, 1 Sneed. 426; Cooley Const. Lims. 533, 546; Murray *v.* Co. Comm., 12 Met. 455; Willis *v.* Farley, 24 Cal. 490.

<sup>2</sup>State *v.* Flannagan, 67 Ind. 140; Craig *v.* People, 47 Ill. 487; State *v.* Lawrence Bridge Co., 22 Kan. 438; State *v.* Lake, 8 Nev. 276; State *v.* Dayton, etc., Toll Road Co., 10 Nev. 155.

<sup>3</sup>People *v.* N. & S. P. R. Co., 86 N. Y. 1.

<sup>4</sup>Pittsburg, etc., Co. *v.* Com., 104 Penna. St. 583.

dividual land owner to recall a dedication made by him. The fee may still remain in the successors of the turnpike company, but, just as in the case of an individual owner, it is burdened with the public easement. In granting the right to lay out and maintain a public toll road, there is no implication that with the expiration of the corporate existence, the highway shall be closed; on the contrary, the plain implication is that the highway, having once been established, it shall not be discontinued except in strict conformity to law, or upon abandonment by the public.<sup>1</sup> In one of the oldest cases upon this subject it was declared that highways could only be discontinued by authority of law and never by the act of individuals.<sup>2</sup> It would be strange indeed if there could be a highway still existing, and yet "the public have no unobstructed right of travel."<sup>3</sup>

The legislature has power to grant to turnpike corporations the right to construct turnpikes on existing public roads, and to invest them with the franchise of gathering tolls.<sup>4</sup> The character of the way is not changed from a public to a private one; for the public are not excluded from the use of the way. It is still open to all the people on equal terms, that is, all may travel on it by paying the tribute laid on all alike. The corporation may exclude the public from the use of the way, for a reasonable time, during the construction of the turnpike, but if, in making the change in the highway, the corporation is guilty of negligence, it will be answerable in damages to one who may have suffered injury from such negligence.<sup>5</sup> Grants of a right

<sup>1</sup> *State v. Maine*, 27 Conn. 641; *Thompson v. Matthews*, 2 Edw. (N. Y.) Ch 202; *Bridge Corp. v. City of Lowell*, 15 Gray, 106; *State v. L. B. Co.*, 22 Kan. 438; *State v. Lake*, 8 Nev. 276; *People v. Davidson* (Cal.), 21 Pacif. R. 538; *Craig v. People*, 47 Ill. 487; *State v. Western, etc., Co.*, 95 N. C. 602.

<sup>2</sup> *Dawes v. Hawkins*, 8 C. B. (N. S.) 857.

<sup>3</sup> The fact that the private corporation desires to abandon the road and does abandon it, leaves it a passage way for travel as long as the public choose to

treat it as such. The act of the private corporation does not take away the rights of the public.

<sup>4</sup> *State v. Hampton*, 2 N. H. 22; *Noblesville Turnpike v. Baker*, 4 Humph. 315; *Pauton Turnpike Co. v. Bishop*, 11 Vt. 198; *People v. Commissioners*, 37 N. Y. 360; *Chagrin Falls Co. v. Cane*, 2 Ohio St. 419; *Opinion of Att'y Gen.*, Dec. 22, 1850; *McKay v. D. & E. R. R.*, 2 Mich. 139. See, also, *Carter v. Clark*, 89 Ind. 238.

<sup>5</sup> *Ireland v. Oswego, etc., Co.*, 13 N. Y. 526.

to use a public road are strictly construed, and a grant to use the way will not confer a right to take and remove earth and gravel,<sup>1</sup> nor to erect toll-houses so as to interfere with private rights,<sup>2</sup> but such a grant will confer authority to make a proper grade and to metal or gravel the surface.<sup>3</sup>

The question as to the extent of the control over turnpikes by the municipal authorities, and as to the liability of the municipality to maintain them in fit and safe condition for travel, is scantily covered by the authorities. Of course there can be no difficulty where the turnpike company surrenders its rights and the municipality accepts the way as a corporate one, for in such a case there can be no doubt that the adoption by the municipal corporation would bind it to keep the way in repair as fully as if it had laid out the way. There is, however, real difficulty where the turnpike is used by the public generally and forms direct connections with the usually traveled streets of the municipality and is necessary for the public accommodation. The franchise of the turnpike corporation and the rights acquired under its charter can not, of course, be taken from it by the municipal authorities, and, therefore, full control can not be acquired by them, and they ought not to be held responsible for ways over which they are not vested with full control. The liability of municipal corporations should not be extended over ways which are primarily and chiefly within the control of private corporations. The municipality would, under the police power, have authority to require the private company owning the turnpike, to keep it in a safe condition, or, perhaps, to make it safe by itself repairing or protecting the dangerous places. If the extent of the municipal authority went no further, then, there would be no liability for a failure to exercise it, or for errors in its exercise; for the law is well settled that for the failure to exercise such a power, or for mere error

<sup>1</sup>Turner v. Rising Sun, etc., Turnp. Co., 71 Ind. 547. See, also, Adams v. Emerson, 6 Pick. 57; Robbins v. Borman, 1 Pick. 122. And compare Locks and Canals v. N. & L. R. R. Co., 104 Mass. 1.

<sup>2</sup>Thompson v. Proprietors, 5 Greenl.

62; Stratton v. Elliott, 83 Ind. 425; Danville, etc., Co. v. Campbell, 87 Ind. 57.

<sup>3</sup>Carter v. Clark, 89 Ind. 238; Bridge Turnp. Co. v. Stoevers, 2 W. & Serg. 548; Tucker v. Tower, 9 Pick. 109.

in its exercise, municipal corporations are not liable.<sup>1</sup> The better opinion is, in our judgment, that municipal corporations can not control turnpikes owned by private corporations as if they were streets of the municipality, and are consequently not responsible for defects in them, or for failure to repair.<sup>2</sup>

The ground upon which public corporations are bound to keep streets in a safe condition for travel is, that they have control over them, and are invested with authority to raise money for the purpose of keeping them in that condition, and there can be no such ground in cases of turnpikes owned by private corporations for at least two reasons; the public corporation can not have complete control of the turnpikes, nor can such corporations raise money by taxation for the purpose of maintaining roads which are owned and operated by private corporations for the private benefit of the corporators. As a general rule, money can be raised only for public purposes by taxation, and the maintenance of turnpikes, from which private corporations derive gain, can not be justly deemed a public purpose in such a sense as to warrant the application of the public funds to the benefit of the owners of such toll roads.<sup>3</sup> The right to gather tolls is given upon the implied condition that the turnpike company shall itself maintain its road, and having this right and being charged with this duty, it can not be held that municipal corporations are responsible for the defective or unsafe condition of the turnpike. That responsibility rests upon the private corporation charged with the duty of keeping the way reasonably safe for travel.

Turnpike corporations owning ways which are brought within the territorial limits of a town or city do not, from that fact

<sup>1</sup>City of Lafayette v. Timberlake, 88 Ind. 330; Hill v. Boston, 122 Mass. 344, S. C. 23 Am. Rep. 322; Hill v. Board, 72 N. C. 55, S. C. 21 Am. Rep. 332.

<sup>2</sup>Indianapolis v. McCluer, 2 Ind. 147; City of Joliet v. Verley, 35 Ill. 53; McCain v. State, 62 Ala. 138. Where there is not a full right of control, and a right to raise money to keep a way in repair, there can not, on principle, be

any liability. It is not the duty of municipalities to keep toll roads in repair, and where there is no duty there is no responsibility. Negligence can only be charged where a duty is violated.

<sup>3</sup>We are not now considering rights or duties under special or express statutory provisions, but under general rules and general statutes.

alone, lose their corporate rights; these still remain in them.<sup>1</sup> They may, however, by the growth of cities and towns, become subject to some burdens not imposed on roads in the country, since to hold otherwise would endow these artificial beings with more rights than belong to natural persons. Owners of lands over which, by the increase of wealth and population, municipal boundaries are extended, may have heavier burdens of taxation imposed upon them and the use of their property limited and restricted by the corporate by-laws, and the principle which applies to natural persons must surely apply to the creatures of legislation. All rights of property, whether held by citizens or corporations, are subject to the governmental power commonly called the police power. This attribute of sovereignty enables the governing power of a State or locality to limit the use of property, and to regulate the conduct of citizens, not, of course, extending to an invasion of constitutional rights. It is by virtue of this power that railroads may be compelled to fence their tracks, citizens to make safeguards about dangerous places in their property, and to so conduct their business as not to imperil the public safety. Police power may be delegated to municipal corporations, and in the exercise of this power they may compel the turnpike corporations to do that which the safety of the public demands. It is not, however, easy to set bounds to this power. Changes in the character of the country must require changes in the roads and ways, and it can hardly be that a turnpike corporation can maintain the grade of its road as originally established and compel the municipal corporation to make its streets conform to that grade, and it must follow, therefore, that, where the public welfare demands a change, the turnpike corporation must yield and make the required alteration. It is but reasonable to hold that the private corporation takes its privileges and franchises upon the implied condition that they shall yield to the reasonable burdens im-

<sup>1</sup> *Detroit v. Plank Road Co.*, 12 Mich. 333; *Quinn v. City of Patterson*, 27 N. J. Law, 35; *Corporation of St. Catharines v. Gardner*, 20 U. Canada C. P. 107. It is in accordance with this general principle that it is held that a stat-

ute prohibiting the establishing of toll-gates within a city, means the city as it existed at the time the statute was enacted. *People v. Detroit, etc., Co.*, 37 Mich. 195;

posed by the growth and development of the country. There are adjudged cases recognizing and enforcing the general principle. It is, indeed, recognized in the long line of cases holding that where there is no statutory provision to the contrary grades of streets may be changed, although private property is greatly injured. There are cases more directly in point; in one of them, for instance, it was held that a railroad company may be compelled to adjust the grade of its track to correspond to the grade of intersecting streets of the municipality.<sup>1</sup>

Turnpikes, like railroads, telephones and telegraphs, are impressed with a public character, and as such are subject to the general police regulations prescribed by the legislature itself, or by a municipal corporation exercising delegated authority under a valid statute. The rule that such things are subject to regulation in a greater degree than purely private property is very ancient, and finds its earliest illustrations in cases of roads and ferries.<sup>2</sup> In our judgment a corporation which has a double character, such as a railroad or a turnpike company, acquires its rights subject to the higher and dominant right of public necessity, and whenever public safety or necessity requires a change in the grade of a turnpike at points where it crosses the streets of a city or town the company must make it. This is substantially the rule with respect to railroads<sup>3</sup> and we

<sup>1</sup> Indianapolis, etc., *Co. v. The State*, 37 Ind. 489.

<sup>2</sup> *Munn v. Illinois*, 94 U. S. 113; *Sawyer v. Vermont, etc., R. R. Co.*, 105 Mass. 196; *Smith v. Eastern R. R. Co.*, 35 N. H. 356; *Bulkley v. New York, etc., R. R. Co.*, 27 Conn. 479; *Bradley v. Buffalo, etc., Co.*, 34 N. Y. 429; *Penna. Co. v. Riblet*, 66 Pa. St. 164, S. C. 5 Am. R. 360; *State v. Nebraska*, 17 Neb. 126; *Vincent v. Chicago, etc.*, 49 Ill. 33; *Thorpe v. Rutland, etc., Co.*, 27 Vt. 140; *Wilder v. Maine, etc., R. R. Co.*, 65 Me. 332; *Jones v. Galena, etc., Co.*, 16 Iowa, 6; *Winona, etc., v. Waldron*, 11 Minn. 515; *Blewett v. Wyandotte, etc., R. R. Co.*, 72 Mo. 583; *Aldwitt v. Ingalls*, 12 East, 257; *Kansas Pacf. R. R. Co. v. Mower*, 16 Kansas, 573; *Com.*

*v. Duane*, 98 Mass. 1; *Mobile v. Yuille*, 3 Ala. (N. S.) 140; *Hockett v. State*, 105 Ind. 250; *Central Co. v. Falley*, 118 Ind. 194; *State v. Perry*, 5 Jones (N. C.), 252; 1 Hargreaves Law Tracts, 6.

<sup>3</sup> *People v. Boston, etc., R. R. Co.*, 70 N. Y. 569; *People v. Squire*, 107 N. Y. 593. See *post* Railroad Crossings. There are decisions which hold that after the chartered rights of the private corporation have vested, it can not be required to make changes to correspond with the grade of public ways, constructed subsequent to the building of the railroad. *City of Erie v. Erie Canal Co.*, 59 Pa. St. 174, *Illinois Central R. Co. v. Bloomington*, 76 Ill. 447. We venture to say that if the right to lay out highways is sovereign (and



are unable to perceive any reason why it does not fully apply to turnpikes. The police power exists without any reservation in the constitution, and it is one that can not be surrendered, so that the franchises of private corporations must be conclusively presumed to be acquired with reference to its existence.

It has been held that a municipal corporation may grade and pave a turnpike within the corporate limits, provided no injury is done to the rights of the private corporation.<sup>1</sup> This is sound enough, but it may well be doubted whether the municipal corporation would not have a right, even in the absence of an express statute, to compel, by proper proceedings, the turnpike company to do its duty in so far as to make the way safe for travel. If the statute expressly requires the turnpike company to repair, and it fails to perform the duty, the municipality may make the repairs and collect the cost from the company.<sup>2</sup>

A turnpike can not be improved at the expense of adjoining land owners,<sup>3</sup> but land owners may, by suffering the work to proceed without objection, estop themselves from denying that the way is a street of the city.<sup>4</sup> It would, however, require a very strong case to warrant the application of the doctrine of estoppel if the way were openly used as a turnpike and tolls exacted from those who travel it. Use of the way as a street

this can hardly be questioned), and if the right to make them safe is within the police power of the State, the private corporation holds whatever rights it acquires subject to these two great elements of sovereignty. Doubtless, if in laying out new public ways any part of the private property of the corporation is seized, it would be entitled to compensation. *Portland, etc., Co. v. Deering*, 78 Me. 67, S. C. 57 Am. R. 784.

<sup>1</sup>*The State v. New Brunswick*, 30 N. J. L. 395. To the extent indicate in the text we believe the decision in the case cited to be sound, but we can not assent to the doctrine that the property of a private corporation, although it is a toll road, can be improved at the expense of adjoining property owners, under a

statute authorizing the improvement of streets and highways, for we think the term "highways" means public ways in the strict sense.

<sup>2</sup>*Town of Versailles v. Versailles, etc., Co. (Ky.)*, 10 S. W. Rep. 280.

<sup>3</sup>*Wilson v. Allegheny City*, 79 Pa. St. 272. We think it clear that under an authority to improve streets, a municipal corporation would have no right to improve a turnpike road, since the right to take tolls imposes upon the private corporation the imperative duty of keeping its road in proper condition for travel, and the municipality can not cast that burden upon the property owners.

<sup>4</sup>*Palmer v. Stumph*, 29 Ind. 329; *State v. Fuller*, 5 Vroom, 227, *vide* p. 235.

by the citizens, it has been held, will entitle the municipality to treat it as a street for all legitimate purposes, and only the private corporation can successfully object.<sup>1</sup> If the citizens are compelled to treat the way as a street by paying the expense of improving and repairing it, the private corporation must certainly lose its right to claim the way as its private property, since it can not be both a turnpike and a street. It may be that as against the municipality the citizens might, in some cases, be estopped while the private corporation would not be, but, certainly, if the private corporation knows that the way is claimed as a street and that money is expended upon it as such, it may, on the same principle which is held to estop the property-owner, be estopped to aver that it is not a street but a turnpike.

If it be granted that the legislature has the power to impose upon adjoining land owners the expense of improving turnpikes within the limits of a municipal corporation, still that power is not to be inferred from the use of general words. For this conclusion there at least two valid reasons. Statutes imposing upon adjoining land owners the burden of improving a street or alley are to be strictly construed.<sup>2</sup> The duty of improving its road rests upon the private corporation having a right to profits in the form of tolls, and it can not be intended that the legislature meant to relieve the private corporation from its duty and compel the property owners to bear the burden.

We have said that turnpike corporations have a public use impressed upon them, and doubtless the primary purpose in conferring corporate franchises upon them is to subserve the public welfare. If such corporations were created solely for the pur-

<sup>1</sup> *State v. Passaic*, 42 N. J. Law, 524; *Jersey City v. State*, 1 Vroom, 521; *State v. Atlantic City*, 5 Vroom, 99; *State v. New Brunswick*, 1 Vroom, 395.

<sup>2</sup> In *State v. Passaic*, it was said: "I consider the law settled in this State to this effect—that the use as a street by the citizens of a municipality within which it lies of a turnpike or plank road, gives it the character of a street to the degree

that its existence as such can not be questioned by any party other than the company which owns the turnpike or plank road."

<sup>2</sup> *Lowell v. French*, 6 Cush. 223; *Finnell v. Kates*, 19 Ohio St. 405; *Dorathy v. Chicago*, 53 Ill. 79; *Wilson v. Poole*, 33 Ind. 443; *Himmelman v. Byrne*, 41 Cal. 500; *Pope v. Headen*, 5 Ala. 433.

pose of enabling the corporators to reap private benefit from them, it is clear that they could not be entitled to many of the rights which the weight of authority awards them. The fact that they do secure rights by virtue of their public character supplies a reason of no feeble strength for the conclusion that they are subject to public control in a much greater degree than corporations created for purely private purposes. Such corporations, because of the element of a public nature which they possess, may, under proper delegation, exercise the right of eminent domain.<sup>1</sup> They are entitled to legal aid and protection beyond that awarded strictly private property. The strongest illustration that turnpike corporations are of a public nature is supplied by the cases—and there are a multitude of them—which hold that taxes may be levied for the purpose of aiding in their construction, and corporations that are entitled to such assistance from the revenues raised by taxation ought, in justice, to be subject to public control to a much greater degree than corporations created for strictly private purposes. If they were public in the full sense of the term, then no one could even plausibly maintain that they would not be subject to legislative control. To the extent that they are public, that control must exist, or the principle upon which it is held that they may be aided by taxation must be denied. We, for our part, believe that in so far as they are public they are subject to legislative control, and we do not believe that the principle of the Dartmouth College case can be so much extended as to exclude the power to compel them to change their grades whenever the public necessity demands it. If it be true, as it is, that the governmental authority to control public matters can neither be surrendered nor bartered away, it must be also true that a public corporation can not be protected, even though its charter be considered as a contract, beyond its private rights and that rights essentially public are subject to legislative control. We can see no valid reason for holding that corporations may be aided by taxation because they are public and yet not controlled because they are private. It must, as it seems to us, be held that, as they are so far of a public nature as to be entitled

<sup>1</sup> State v. Maine, 27 Conn. 641.

to aid from the public treasury, they are subject to control as are other public matters and affairs. It is because they are public that citizens can be coerced to aid them, and what can be aided as a public enterprise can certainly be controlled as are other public undertakings, and this principle must enter into every charter as a factor for the reason that the law enters into every contract.

We do not doubt the power or the duty of the legislature to protect the private rights of turnpike companies, and we know that some of the courts have gone to great lengths in their favor.<sup>1</sup> Nor do we doubt that, in a proper case, the courts would protect a turnpike company against a wanton or oppressive interference with its rights, but we are unable to regard a change of grade required by reasonable public necessity as an unlawful interference with its chartered rights.<sup>2</sup> Conceding, as every one must under the great weight of authority, that there is power to aid by taxation, we think it must be concluded that the right to this aid imposes a corresponding qualification upon the charter-granted rights, namely, that of control substantially to the same extent as it exists over purely public roads, in so far as change of grade and the building of new highways are concerned.

There is a broad and plain distinction between taxing the citizens to aid corporations in constructing toll roads and taxing them to build and maintain public roads and streets. Roads and streets are matters of public concern in the strictest sense and are under governmental control,<sup>3</sup> while private corporations are, except in so far as they are charged with public duties, under the control of corporate officers in whose selection the taxpayers and electors have no voice. If the right

<sup>1</sup> Franklin, etc., Co. v. County Court, 8 Humph. 342; Hall v. Ragsdale, 4 Stewart & P. 252.

except that the claim of the citizen seems much stronger.

<sup>2</sup> We have no doubt, we may add, that if private property rights are taken, the company is entitled to compensation, but requiring a change of grade is not taking a private property right. Such a case rests upon the same principle as the change of grade of a street,

<sup>3</sup> Philadelphia v. Field, 58 Pa. St. 320; Thomas v. Leland, 24 Wend. 65; Norwich v. County Commissioners, 13 Pick. 60; Hingham, etc., v. Norfolk Co., 6 Allen, 353; Warder v. Commissioners, 38 Ohio St. 639; Jensen v. Supervisors, 47 Wis. 298.

to tax can be supported it must be upon the ground that the electors through their representatives have a right to control the road in so far as it is of a public nature and is affected by the public demands and necessities, for, if this be not true, one of the fundamental principles of free government is violated inasmuch as there would be taxation without representation. It is not to promote the public welfare that toll roads are built so much as to advance private interests, and private interests in so far as they are such can not be impaired, but back of this lies the question, where do the private interests secured by the charter, regarded as a contract, end, and where do the public rights begin and what is their scope and character?

The power of the legislature to authorize the citizens of a locality to tax themselves to aid in the construction of turnpikes and railroads, is maintained by nearly all of the courts of the country;<sup>1</sup> this doctrine has not, however, passed unchallenged, it has been vigorously assailed by able courts in strongly reasoned opinions.<sup>2</sup> It has found no favor with the text-writers. There are weighty objections to the prevailing view, and it has led to disastrous consequences. The power to lay taxes, broad as it unquestionably is, is not an unlimited one, for it can not be granted that the legislature may exact taxes from one class of citizens for the private benefit of another. Private business can not be maintained by public taxation. There is a limit to the legislative power to lay taxes independent of any express

<sup>1</sup> *Amey v. Allegheny City*, 24 How. 364; *Fielder v. Montgomery*, 51 Ala. 178; *Stockton, etc., Co. v. Stockton*, 41 Cal. 147; *Douglas v. Chatham*, 41 Conn. 21; *Columbia Co. v. King*, 13 Fla. 451; *Winn v. Macon*, 21 Ga. 275; *Quincy, etc., Co. v. Morris*, 84 Ill. 410; *L. M. & B. R. R. v. Geiger*, 34 Ind. 185; *Stewart v. Supervisors*, 30 Iowa, 9, S. C. 1 Am. Rep. 238; *Commissioners v. Miller*, 7 Kansas, 479, S. C. 12 Am. R. 425; *Shelby Co. v. Cumberland, etc., Co.*, 8 Bush. 209; *Parker v. Scogin*, 11 La. Ann. 629; *Augusta Bank v. Augusta*, 49 Me. 507; *Davidson v. Ramsey Co.*, 18 Minn. 482; *New Orleans, etc.,*

*Co. v. McDonald*, 53 Miss. 240; *Osage Valley Co. v. Morgan*, 53 Mo. 156; *Bank v. Rome*, 18 N. Y. 38; *Hill v. Forsythe Co.*, 67 N. C. 367; *Walker v. City*, 21 Ohio St. 14, S. C. 8 Am. R. 24; *Armstrong v. Perkins*, 43 Pa. St. 400; *City of San Antonio v. Gould*, 34 Texas, 49; *Oleson v. Green Bay, etc., Co.*, 36 Wis. 383.

<sup>2</sup> *Cooley's Const. Lim.* (5th ed.), 264; *Dillon Municipal Corp.*, § 104; *Sedg. Const. Law*, 464; *People v. Salem*, 20 Mich. 452, S. C. 4 Am. R. 400; 9 Am. Law. Reg. 487, note; *Hanson v. Vernon*, 27 Iowa, 28, S. C. 1 Am. Rep. 215.

constitutional restriction, and that limit is found in the nature of the power itself. The power to lay taxes springs out of the public necessity for revenues for public purposes, and, theoretically, at least, all revenues raised by taxation are for purposes essentially of a public character. It is therefore implied, in the very nature of the taxing power, that it exists only for the purpose of raising public revenues. It may not always be easy to discriminate between private and public purposes, but there can be little doubt that the true rule is that money raised by taxation is always for the public benefit, and never for private purposes. In one case<sup>1</sup> a much broader rule is stated, and it is said that the legislature is the sole judge of whether the purpose is public or private, but this statement of the rule will be found on examination to be of doubtful soundness, for the general principle is that courts will interfere to prevent the exercise of the taxing power for the benefit of private interests. This general doctrine has been declared and enforced in many cases; thus, taxes can not be levied for the purpose of assisting private manufacturing corporations, nor for the purpose of assisting land owners, whose buildings have been destroyed by fire, to rebuild, nor for the purpose of providing unfortunate farmers with seeds.<sup>2</sup> These cases, and others of like character, proceed upon the broad ground that taxes can only be levied for public purposes.<sup>3</sup> It is difficult to perceive how a railroad or a turnpike built by a private corporation can be brought within the rule, for such things are built by the corporators, not for the public benefit, but for their own. No doubt they, in many instances, do benefit the public, but this is not a whit less

<sup>1</sup> *The Town of Guilford v. Board*, 13 N. Y. 143. Distinguished and limited in *Weismar v. Village of Douglass*, 64 N. Y. 91, S. C. 21 Am. R. 588.

<sup>2</sup> *Allen v. Inhabitants*, 60 Me. 124, S. C. 11 Am. Rep. 185; *State v. Tappan*, 29 Wis. 664; *Loan Ass. v. Topeka*, 20 Wall. 655; *Speer v. School Directors*, 50 Pa. 150; *Commercial Bank v. Iola*, 9 Kan. 689; *Mount v. State, ex rel.*, 90 Ind. 29, S. C. 46 Am. Rep. 192; *Lowell v. Boston*, 111 Mass. 454, S. C. 15 Am.

Rep. 59; *State v. Osawkee*, 14 Kan. 418; *Halstead v. Mayor*, 3 N. Y. 430; *Clark v. Des Moines*, 19 Iowa, 199; *People v. Salem*, 20 Mich. 452.

<sup>3</sup> While the right, conceding the soundness of the general doctrine, to levy taxes is generally one of legislative exercise, still the courts will interfere where the tax is unequal and unjust. *Howell v. Bristol*, 8 Bush. 493; *Matter of Washington Avenue*, 69 Pa. St. 364.

true of mills, of factories, of schools, and other private business enterprises of like character.

It is sometimes said that railroad and turnpike companies are public corporations, but this is plainly an error. In no event can the legislature take from them their corporate privileges and franchises, unless, indeed, that right is expressly reserved; and this, of itself, proves that they are not public corporations, for if they were they would be subject to the legislative will,<sup>1</sup> and would not be within the constitutional provision upon which rests the doctrine of the Dartmouth College case. There is, perhaps, more reason for holding that aid may be given to a turnpike than for holding that it can be voted to railroads, for the former remains a highway even though the private corporation may abandon it,<sup>2</sup> and this can not, in all cases, be true of railroads. It is, however, true that both turnpikes and railroads are common to all the citizens upon equal terms, and in this respect they may be said to be public. The cases which hold that citizens may be taxed to aid turnpikes and railroads proceed, in great part, upon the theory that they are of benefit to the general public and that all citizens have interests and rights in them, and that, for this reason, the tax is levied for a public purpose. This reasoning is not entirely without force, and if the doctrine of the cases built upon it is carefully confined within the limits to which a logical adherence to the principles upon which it proceeds requires, then the doctrine is not of such mischievous tendencies as some of its critics have supposed. A distinction is made by some of the courts<sup>3</sup> between the power of the legislature to compel the citizens of a locality to tax themselves for the benefit of turnpikes, and the power to permit them to do so; but this is questionable doctrine, for if the power resides in the legislature at all it must be a sovereign one, and sovereign powers can not depend upon the vote of the citizens of a particular locality.

Public corporations as cities, counties and towns are political subdivisions, and are subject to legislative control. Funds de-

<sup>1</sup> *Merriweather v. Garrett*, 102 U. S. 472; *Sloan v. State*, 8 Blackf. 361; *People v. Morris*, 13 Wend. 325.

<sup>2</sup> *Woolrych on Ways*, 14.

<sup>3</sup> *People, ex rel., v. Batchelor*, 53 N. Y. 128.

rived from taxation may be appropriated by the legislature to public purposes connected with the corporate powers and duties. Cities and towns are instrumentalities for the convenient administration of government, and what the legislature may do directly it may do through the medium of these instrumentalities, for they are the mere subordinates of the legislative power.<sup>1</sup> It is agreed, without much diversity of opinion, that the legislature may compel the appropriation of funds received by municipal taxation to public corporate purposes, but upon the question whether public corporations can be deemed to have such proprietary interests in property as to place it beyond legislative control,<sup>2</sup> as well as upon the question whether funds raised by local taxation in one locality can be applied to local public purposes for the benefit of a corporation other than that in which the taxes were levied and collected, there is sharp conflict.<sup>3</sup> The doctrine most consistent with sound principle, and the one which best accords with our system of local government, is that which prohibits the citizens of one city or county from being specially taxed for the benefit of any other.

The authority to aid in the building of turnpikes is not a general corporate power, it exists only by virtue of statute. It is always necessary, therefore, for one claiming rights under a donation or subscription in aid of a turnpike or railroad to show an express statute and a substantial compliance with its provis-

<sup>1</sup> *New Orleans v. Clark*, 95 U. S. 644; *Mount v. State*, 90 Ind. 29; *Lucas v. Board*, 44 Ind. 524; *Dennis v. Maynard*, 15 Ill. 477; *People v. Ingersoll*, 58 N. Y. 1; *Home Ins. Co. v. City Council*, 93 U. S. 116; *State, ex rel., v. St. Louis*, 34 Mo. 546; *Baltimore v. Board of Police*, 15 Md. 376; *Layton v. New Orleans*, 12 La. Ann. 515; *People v. Vanderbilt*, 26 N. Y. 287; *Youngs v. Hall*, 9 Nevada, 212; *Love v. Schenck*, 12 Iredell Law, 304.

<sup>2</sup> *Darlington v. Mayor*, 31 N. Y. 164; *Richland Co. v. Lawrence Co.*, 12 Ill. 1; *People v. Hurlburt*, 24 Mich. 44, S. C. 9 Am. Rep. 103; *People v. Detroit*, 28 Mich. 228, S. C. 15 Am. Rep. 202; *Gro-*

*gan v. San Francisco*, 18 Cal. 590; *Oliver v. Worcester*, 102 Mass. 489; *Hill v. Boston*, 122 Mass. 344, S. C. 23 Am. Rep. 332; *Spaulding v. Andover*, 54 N. H. 38; *Western Saving Fund Society v. City of Philadelphia*, 31 Pa. St. 175; *U. S. v. Baltimore, etc., Co.*, 17 Wall. 332; *Richmond v. Richmond*, 21 Gratt. 604.

<sup>3</sup> *In re Town of Flatbush*, 60 N. Y. 398; *Wells v. City of Weston*, 22 Mo. 384; *State Tax on Foreign Bonds*, 17 Wall. 300; *St. Charles v. Nolle*, 51 Mo. 122, S. C. 11 Am. Rep. 440; *People v. Townsend*, 56 Cal. 633; *State Treasurer v. Auditor*, 46 Mich. 224; *Langhorn v. Robinson*, 20 Grattan, 661.



ions. The purpose must be one which the statute authorizes the public corporation to aid, and the aid must be of the general character prescribed by the enabling statute.<sup>1</sup>

Toll, in the sense in which we here employ the word, is the price paid for the privilege of passage over a road open to the public.<sup>2</sup> The right to exact toll commonly comes from the law,<sup>3</sup> although it is said that it is a right that may be created by prescription.<sup>4</sup> The common law recognized the right to exact tolls as founded upon prescription, but required one who asserted a prescriptive right to show both the immemorial usage and the consideration.<sup>5</sup> The consideration for the right to exact toll is the undertaking of the owner of the road to maintain it in a reasonably safe and convenient condition for travel. In this country the right to collect toll is generally conferred by statute, and there is reason to doubt whether it can be conferred in any other mode, for franchises of this nature are derived from legislative grants.

The right can only be exercised in conformity to law. This much may be definitely said upon the general subject, all the material things the statute requires to be done in order to entitle a corporation or an individual to exact toll must be done.<sup>6</sup>

<sup>1</sup> *Board v. McClintock*, 51 Ind. 325; *Cooley Const. Lim.* (5th ed.), 269; *The State v. Saline Co.*, 45 Mo. 242; *Shelby Co. v. Cumberland*, 8 Bush. 209; *Mercer Co. v. Pittsburg*, 27 Pa. St. 390; *Falconer v. Buffalo, etc., Co.*, 69 N. Y. 491; *Lawson v. Schmelter*, 33 Wis. 288; *Wagner v. Meety*, 69 Mo. 150; *Concord v. Portsmouth Savings Bk.*, 92 U. S. 625; *Marsh v. Fulton Co.*, 10 Wall. 676; *Hancock v. Chicot Co.*, 32 Ark. 575; *Smith v. City of Madison*, 83 Ind. 502; *Burroughs Public Securities*, 297; *Pierce on Railroads*, 99; *Jones on Railroad Securities*, § 286; 1 *Dillon Municipal Corp.*, § 513.

<sup>2</sup> *Boyle v. Philadelphia, etc., R. R. Co.*, 54 Pa. St. 314; *Pa. R. R. Co. v. Sly*, 65 Pa. St. 210.

<sup>3</sup> *Truman v. Walgam*, 2 Wils. 296. In this case it was said: "Courts are

exceedingly jealous of these claims of rights to levy money upon the subject. These tolls began and were established by the power of great men."

<sup>4</sup> *Panton Turnpike Co. v. Bishop*, 11 Vt. 198. But this doctrine as applied to this country may well be doubted. *Fales v. Whiting*, 7 Pick. 225.

<sup>5</sup> *Harpur v. Wils*, 1 Mod. 47; *Warren v. Pridaux*, 1 Mod. 104; *Pelham v. Pickersgill*, 1 Term R. 660; *Yarmouth v. Eaton*, 3 Burr. 1402.

<sup>6</sup> *Bartram v. Central Canal Co.*, 25 Cal. 283; *Turnpike Co. v. Campbell*, 2 Humph. 467; *Kemper v. Cincinnati, etc., Co.*, 11 Ohio, 392; *Justices v. G. & W. Co.*, 9 Ga. 475; *Charles River Bridge Co. v. Warren*, 11 Peters, 420. The statutes differ so much that it would subserve no useful purpose to consider the decisions in detail.

Such rights are special, and if there is fair doubt as to the meaning of the statute it will, in accordance with the familiar rule, be construed in favor of the public and against the claimant.<sup>1</sup>

The general rule is that toll can only be collected at gates, established as the statute directs, along the line of the turnpike.<sup>2</sup> The corporation can not extend its line beyond the limits defined by the law,<sup>3</sup> nor can it establish toll-gates at places different from those at which the law says they shall be placed, although the local highway officers may enter into a contract authorizing the gates to be placed at different places.<sup>4</sup> It has been held that where a toll-gate is once regularly established it can not be changed to another place, unless the change is authorized by statute, or is required by some strong and apparent necessity.<sup>5</sup> Where discretionary authority is granted a turnpike company to establish toll-gates, it may establish them at such places on the line of its road as it deems proper, and may increase the number,<sup>6</sup> but this discretionary power must be fairly and reasonably exercised, and in such a mode as not to

<sup>1</sup> *Lees v. Manchester, etc., Co.*, 11 East, 645; *Hall v. Grantham Canal Co.*, 13 M. & W. 114. The right to exact toll implies the authority to appoint agents to collect toll and place proper gates for the collection of toll along the line of the turnpike. *Ward v. Marietta*, 6 Ohio St. 15; *Cheshire Co. v. Stevens*, 10 N. H. 133; *City v. Detroit, etc., Co.*, 12 Mich. 333; *Fowler v. Pratt*, 11 Vt. 369.

<sup>2</sup> *Russell v. Muldraugh Co.*, 13 Bush. (Ky.) 307; *Lincoln Av. Co. v. Daum*, 79 Ill. 299; *Turnpike Co. v. Vandusen*, 10 Vt. 199. But it is held that parties may by contract bind themselves to pay toll although not demanded at a toll-gate. *Patterson v. Indianapolis, etc., Co.*, 56 Ind. 20; *New Albany, etc., Co. v. Lewis*, 49 Ind. 161. If these decisions are to be understood as dispensing with the duty of establishing regu-

lar gates, they are, in so far as that question is concerned, not well decided.

<sup>3</sup> *Pontiac, etc., Co. v. Hilton (Mich.)*, 36 N. W. R. 739.

<sup>4</sup> *State v. Douglas Co.*, 10 Oregon, 185. A contract with an alderman to move a gate out of a city was held void in *Detroit, etc., Co. v. Mahoney (Mich.)*, 36 N. W. Rep. 69.

<sup>5</sup> *Turnpike Co. v. Hosmer*, 12 Conn. 361; *State v. Norwalk Co.*, 10 Conn. 157; *Griffin v. House*, 18 Johns. 397; *Hartford, etc., Co. v. Baker*, 17 Pick. 432. But see *Fowler v. Pratt*, 11 Vt. 369.

<sup>6</sup> *The Cheshire, etc., Co. v. Stevens*, 10 N. H. 133; *Farmers, etc., Co. v. Coventry*, 10 Johns. 389; *Mallory v. Austin*, 7 Barb. 626; *Stewart v. Rich*, 1 Caines, 182; *People v. Kingston, etc., Co.*, 23 Wend. 193.

oppress or unnecessarily harass or annoy persons having a right to use the road.

The general rule that toll is lawfully demandable only at a regularly established gate, can not be used as a shield by one who fraudulently seeks to avoid the payment of toll by evading the gates. The rule is intended for the benefit of those who in good faith use the road, and can not be made available by those who fraudulently seek to avoid toll by turning off the road.<sup>1</sup> If the traveler turns off the road before reaching the gate, in good faith, he can not, as a general rule, be required to pay toll,<sup>2</sup> but if his purpose is a fraudulent one it is otherwise.<sup>3</sup>

Where a turnpike company has a right to collect tolls it may close its gate against one whose duty is to pay toll, but who refuses to do so, and thus bar his passage.<sup>4</sup> The right of a citizen to travel upon a turnpike is not an absolute one, but as a condition of its exercise he is required to pay the lawful toll demanded of him at the proper gate. If the traveler cuts down a gate rightfully closed against him because of his failure to pay toll, he is guilty of a malicious trespass and may be prosecuted for the misdemeanor,<sup>5</sup> and also sued for the damages resulting to the owners of the turnpike from his unlawful act.

It is, of course, competent for the legislature to exempt designated persons and property from the payment of toll by the insertion in the charter or act of incorporation of the appropriate provisions, and such exemptions are, as a general rule, construed strictly against the corporation.<sup>6</sup> But while such provisions are strictly construed as against the corporation, it is never-

<sup>1</sup> Morton, etc., v. Wysong, 51 Ind. 4; Hunter v. Burnsville, etc., Co., 56 Ind. 213. We think these decisions may be sustained because the fraudulent purpose of the defendant was shown, but there are some expressions in the opinions that are unquestionably erroneous. It may be that a statute authorizing the collection of toll without the erection of gates would be valid, but the statutes acted upon in the cases cited, do not, as it seems to us, go to that extent.

<sup>2</sup> Fitch v. Lothrop, 2 Root (Conn.),

525; Russell v. Muldraugh, etc., Co., 13 Bush. 307.

<sup>3</sup> Lincoln, etc., Co. v. Daum, 79 Ill. 299; Lexington, etc., Co. v. Redd, 2 B. Monroe, 30.

<sup>4</sup> Bock v. State, 50 Ind. 281.

<sup>5</sup> State v. Walters, 64 Ind. 226; Bock v. State, 50 Ind. 281.

<sup>6</sup> Turnpike Co. v. Freeman, 14 Conn. 85; Harrison v. James, 2 Chitty, 347; Hickenbotham v. Perkins, 3 Moore, 185; Hearsey v. Pruyn, 7 Johns. 179.

theless incumbent upon the person who claims the benefit of the exemption to show that he is fairly within the terms of the statute.<sup>1</sup> Many cases illustrative of the right to claim exemptions under statutes may be found in the books, but they are so far dependent upon statutes that we deem it unnecessary to cite them.<sup>2</sup> The legislative authority to exempt from toll can not, in many jurisdictions, be so exercised as to unjustly discriminate against a class of persons by granting to designated persons special favors, which, upon the same terms, can not be enjoyed by all citizens. The principle which precludes the enactment of laws conferring special privileges upon a favored class applies to turnpike companies as well as to all other corporations.

The right to toll may generally be waived by contract.<sup>3</sup> But a turnpike company would, as we suppose, have no right to unjustly discriminate in favor of individuals so as to give them undue advantages over competitors under pretext of relieving them from the payment of toll or of reducing it below the legal rate. The principle which applies to common carriers ought to apply to turnpike corporations. The reason for the application of the principle is as strong in the one case as in the other, and public policy forbids either a common carrier or a turnpike corporation from making a discrimination that will enable one citizen to secure an undue advantage of another.<sup>4</sup> A franchise of a public nature, existing by virtue of legislative grant, can not, on principle, be permitted to be so used as to unduly advance the interests of one citizen at the expense of others. This principle forbids unfair discrimination by exemptions from toll by turnpike corporations by contract or otherwise.

A turnpike company may maintain an action to recover toll

<sup>1</sup> *Stratton v. Herrick*, 9 Johns. 356; *Stratton v. Hubbel*, 9 Johns. 357; *Pasumpsic Turnpike Co. v. Langdon*, 6 Vt. 546.

<sup>2</sup> Many cases are collected in Angell on Highways (3d ed.), note to section 359

<sup>3</sup> *Adams v. City of Ft. Gaines* (Ga.),

5 S. E. Rep. 241; *Park v. Richmond, etc., Co.* (Ky.), 9 S. W. Rep. 423; *Com. v. Alleghany Bridge Co.*, 8 Harrs. (Pa.) 185; *Delaware, etc., Co. v. Pa. Canal Co.*, 9 Harrs. (Pa.) 131.

<sup>4</sup> *Munn v. Illinois*, 94 U. S. 113; *Chicago, etc., Co. v. Iowa*, 94 U. S. 155; *Slaughter House Cases*, 16 Wall. 36.

lawfully due.<sup>1</sup> In addition to this right, it is often provided that one who wrongfully refuses to pay toll may be compelled to pay a penalty. Penalties for a violation of such a statute are enforceable at common law in an action of debt.<sup>2</sup> Unless given by statute, there is no right to a penalty; it can not be created by a by-law adopted by the corporation.<sup>3</sup> It is hardly necessary to say that, as the penalty is given only by statute, one who seeks to enforce it must, in accordance with the familiar rule governing causes of action of purely statutory creation, make out a case within the statute.<sup>4</sup> It may be suggested, although it will readily occur to one's mind without the suggestion, that such statutes fall within the general rule that penal statutes must be strictly construed.

While it is true that a corporation suing to recover the statutory penalty for wrongfully refusing to pay toll must make out a case, still, it is not bound to show that it was regularly incorporated, for it will, in general, be sufficient to show that it has acted as a corporation under claim of right and has been recognized as such by the public. It is no defence that the person who violated the law believed that the corporation was not regularly organized.<sup>5</sup>

Turnpike corporations may make reasonable and lawful by-laws providing for the collection of tolls. Such by-laws, it is perhaps well enough to suggest, must not contravene the provisions of the act of incorporation, or attempt to create rights

<sup>1</sup>Chesley *v.* Smith, 1 N. H. 202; Proprietors, etc., *v.* Taylor, 6 N. H. 499; New Albany, etc., Co. *v.* Lewis, 49 Ind. 161; Seward *v.* Baker, 1 Tenn. 616; Peacock *v.* Harris, 10 East, 104; Ayers *v.* Turnpike Co., 4 Halst. 33. The right to stop travelers does not preclude the company from maintaining an action, for the remedies are cumulative. Chesley *v.* Smith, *supra*. It has been held (a questionable judgment we believe), that if one passes a toll-gate under claim of right, he can not be sued in assumpsit, even if his claim is unfounded. Centre, etc., Co. *v.* Smith, 12 Vt. 212. We think the law will imply a promise

to pay for the use of the road. New Albany, etc., Co. *v.* Lewis, 49 Ind. 161.

<sup>2</sup>Morton Gravel Road Co. *v.* Wy-song, 51 Ind. 4; Western Union Tel. Co. *v.* Scircle, 103 Ind. 227; Dunham *v.* State, 117 Ind. 480. The legislature may, of course, provide the remedy. Dunham *v.* State, *supra*.

<sup>3</sup>Wayne, etc., Co. *v.* Bosworth, 91 Ind. 210.

<sup>4</sup>Columbia Turnpike Co. *v.* Woodworth, 2 Caines, 97.

<sup>5</sup>Hunter *v.* Burnsville, etc., Co., 56 Ind. 213; Detroit *v.* Mahoney (Mich.), 36 N. W. 69.

not conferred by law. A by-law requiring a traveler paying full toll at one gate to take a ticket entitling him to pass a gate further on has been adjudged reasonable and valid.<sup>1</sup>

It is not competent for a defendant, in an action brought to compel the payment of toll, to question the regularity of the organization of the turnpike company, but it would doubtless be competent to show that there was no valid statute authorizing the taking of toll, that the statute had been repealed, or that the franchise has terminated by the expiration of the time limited by statute for its enjoyment.<sup>2</sup> The general rule is that corporate rights can only be forfeited by a judicial judgment, and there is no reason why this rule should not apply to turnpike corporations; if it does, then it must follow that in a collateral action, such as one to collect toll, the defendant can not aver that the charter has been forfeited.<sup>3</sup> An apparent exception to this rule exists where the statute expressly declares what shall constitute a forfeiture, and invests citizens with the right to insist upon it as against a corporation asserting a cause of action against them. But this exception is apparent, rather than actual, for the right given the citizen in such cases is to defeat the exercise of a franchise in a particular instance and not to destroy the corporate existence. It is often provided that a right to exact toll shall be forfeited if the road is suffered to get out of repair, and a person sued for toll may undoubtedly show that by suffering the road to get out of repair the turnpike company has lost its right to collect toll. It is competent for the legislature to provide what acts shall constitute an abandonment of a turnpike, and when the thing happens which the statute expressly and explicitly declares shall be deemed to constitute an abandonment, the right to collect toll is lost.<sup>4</sup> The question in such a case is not whether the corporation

<sup>1</sup> *State v. Brumfield*, 83 Ind. 136. It seems clear that the decision stands on a secure footing, for the principle which it asserts has again and again been applied in cases of common carriers of passengers.

<sup>2</sup> *Adams v. Beach*, 6 Hill, 271.

<sup>3</sup> *Rex v. Passmore*, 3 Term R. 244; *North v. State*, 107 Ind. 356; *Cincinnati, etc., R. R. Co. v. Clifford*, 113 Ind. 460.

<sup>4</sup> *The Western, etc., Co. v. The Central, etc., Co.*, 116 Ind. 229; *State v. Huggins*, 47 Ind. 586.

ceases to exist, but whether it has lost its right, by its own breach of duty, to collect toll from persons traveling its road.

A road intended to furnish a way of evading a toll-gate and constructed for that special purpose is frequently called a "shun pike." It is lawful to build roads although they may interfere with the right to collect toll, if they are built for the convenience of the public,<sup>1</sup> but it is not lawful to build "shun pikes" for the sole purpose of impairing or destroying the right to collect toll.<sup>2</sup> The fact that a road built without a special purpose to diminish tolls does have that effect, will not make it unlawful, for the private right must yield to the public convenience and necessity.

The term "highways," when used in statutes making it a misdemeanor to obstruct highways, is generally held to include turnpike roads, and one who places obstructions in such a way may, in the proper case, be prosecuted for creating a nuisance. The owners of the turnpike road may also have an action against one who unlawfully obstructs it and occasions them a special injury. Where a turnpike is used, and recognized as such, a person prosecuted or sued for unlawfully obstructing it can not, as a general rule, defend upon the ground that there was an irregularity in the proceedings, nor, indeed, will one who has no claim as an owner or abutter be heard to aver that the way was not lawfully established where the public authorities, the land owners, and the abutters recognize and use it as a lawful highway.<sup>3</sup> The owners of the road may themselves create a nuisance which a citizen having a right to pass may himself abate, as, for instance, by maintaining a gate when the road has been out of repair for an unreasonable length of time.<sup>4</sup>

<sup>1</sup> Charles River Bridge Co. v. Warren River Bridge, 11 Peters, 420; The Crawfordsville, etc., Co. v. Smith *et al.*, 89 Ind. 290.

<sup>2</sup> Auburn, etc., Co. v. Douglass, 12 Barb. 553; Franklin, etc., Co. v. County Court, 8 Humph. 342; Hall v. Ragsdale, 4 Stewart & Porter, 252; Nashville, etc., Co. v. Shelby, 10 Yerger, 280, Whites, etc., Turnpike Co. v. Davidson, 3 Tenn. Ch. 396; Newburgh Turnpike

Co. v. Miller, 5 Johns. Ch. 101. In the two cases last cited it was held that an injunction will issue to restrain the illegal opening of a "shun pike."

<sup>3</sup> Shippen v. Paul, 34 N. J. Eq. 314.

<sup>4</sup> State v. Flannagan, 67 Ind. 140. It is competent for a citizen specially injured to restore a road to its former condition. Reed v. Cheney, 111 Ind. 390. But one whose wagon has an unusual load, or is loaded in an unusual

The right of the public to travel the road is one which the owners of the turnpike can not unreasonably abridge, and if they do so by placing obstructions on it, they will be liable to one who suffers a special injury. While the turnpike owners have no right to unnecessarily obstruct travel they have, nevertheless, the right to close the road against travel when necessary to enable them to repair or improve it, but they are bound to proceed with reasonable care and diligence, and have no right to unnecessarily impede travel, nor to keep persons from using the road for an unreasonable length of time.

It is the duty of a turnpike company invested with the right of exacting toll to keep its road in a reasonably safe condition for travel.<sup>1</sup> A breach of this duty, followed by a special injury, gives to the person who sustains such an injury a cause of action. This duty need not be expressly enjoined by statute, for it arises from the privileges which the corporation receives and from the invitation which it impliedly extends to the public to travel its road. It is, therefore, something more than a mere statutory duty, although it is sometimes expressly enjoined by statute. The invitation to the public to travel the road, accompanied by the assertion of the right to gather toll, makes a *prima facie* case.<sup>2</sup> If these elements exist the company is burdened with the duty of using due care and skill to keep its road in repair.<sup>3</sup> It has, indeed, been adjudged that so long as it continues to take toll it is liable, although it gives warning of danger,<sup>4</sup> but this doctrine must be taken with some qualification, for if one is warned of danger, and, notwithstanding the warning, knowingly thrusts

manner, has, it has been decided, no right to tear down a toll-gate, although it obstructs his passage, provided the gate is such as will not hinder passage by vehicles loaded in the ordinary manner.

*Straits v. Turnpike Co.*, 11 Conn. 468.

<sup>1</sup> *People v. Plymouth, etc., Co.*, 32 Mich. 248; *Franklin Turnpike Co. v. Crockett*, 2 Sneed, 263; *Baltimore, etc., Co. v. Cassell*, 66 Md. 419; *Brookville, etc., Co. v. Pumphrey*, 59 Ind. 78; *The Wayne, etc., Co. v. Henry*, 5 Ind. 286; *Zuccarello v. Nashville, etc., Co.*, 3

*Baxter*, 364; *Grigsby v. Campbell*, 5 Rich. (Law), 443; *Townsend v. Susquehanna, etc., Co.*, 6 Johns. 90; *Goshen, etc., Co. v. Sears*, 7 Conn. 86; *Frankfort Bridge Co. v. Williams*, 9 Dana, 403; *Noyes Turnpike Co. v. Berry*, 11 Vt. 531; *State v. Patton*, 4 Iredell, 16.

<sup>2</sup> *State v. Wayne*, 1 Hawks, 451.

<sup>3</sup> *Com. v. The Worcester, etc., Co.*, 3 Pick. 327.

<sup>4</sup> *Randall v. Proprietors of Cheshire Turnpike*, 6 N. H. 147.



himself upon it, he can not recover even though the defendant may have been a wrong-doer. This is a general principle running through all branches of the law, and is within the principle of many of the decisions based upon the maxim, "*volenti non fit injuria*,"<sup>1</sup> as well as those asserting and illustrating the doctrine of contributory negligence.<sup>2</sup>

The duty of the turnpike company extends so far as to require it to make the way over which travelers are expressly or impliedly invited to pass reasonably safe. Whatever is in fact part of the road, and also what is made to seem part of the road to one exercising ordinary prudence, must be kept in a reasonably safe condition. Bridges forming part of the company's way must be made and kept safe for use.<sup>3</sup> Ordinarily the duty of maintaining a bridge not owned by the company, and for which it takes no toll, does not rest upon the turnpike company, although its road may lead to it. We think, however, that there might be cases where this duty would exist, although the turnpike company neither owns the bridge nor takes toll for the use of it. If the company, by its negligent acts or omissions, induces a traveler to believe that a bridge which he must cross in traversing its road is safe, when, in fact, it is unsafe, and of its unsafe condition the company has notice, it ought, on principle, to be held liable. There is, in such a case, an implied invitation to the traveler to pursue his course, want of knowledge on the part of the traveler, and knowledge on the part of the company, and from these facts a duty arises for a breach of which an action will lie. In the case stated the turnpike company holds out the bridge as its own, and it ought not to be required of the traveler to ascertain at his peril who does own it, or that it is safe. On the other hand, it is imposing a duty easily performed upon the turnpike company in requiring it to give timely and suitable warning of the unsafe condition of the bridge which appears to be part of its way.

<sup>1</sup>Gould v. Oliver, 2 Scott. N. R. 257; Illott v. Wilkes, 3 B. & Ald. 311; Louisville, etc., R. R. Co. v. Bisch. (Ind.), 22 N. E. R. 662.      <sup>3</sup>Randall v. Proprietors, etc., 6 N. H. 147; Townsend v. Susquehanna, etc., Co., 6 Johns. 91; People v. Hillsdale, 23 Wend. 254.

<sup>2</sup>Butterfield v. Forrester, 11 East, 60; Beach on Contrib. Negl., section 7.

If the proximate cause of an injury is the negligence of the corporation in suffering its road to become unsafe, it is liable, although the concurring negligence of a third person may have contributed to the injury. The doctrine that one guilty of a wrong is liable to the person injured, although the act of a third person may have contributed to the injury, is a familiar one, and is illustrated by many cases in the branch of the law now generally placed under the title of negligence. As applied to highway cases, the general doctrine is strikingly exemplified by the rule that one seated in a vehicle and injured by a defect in the road may recover, although the driver of the vehicle was guilty of negligence.<sup>1</sup>

The duty of a turnpike company is to use ordinary care to keep its road safe for travel.<sup>2</sup> It is not, in the absence of a statute, an insurer or warrantor of the safety of its road, but it is bound to exercise reasonable care and skill to keep it in repair.<sup>3</sup> A turnpike corporation, as it has been held, can not escape liability to one injured by its breach of duty upon the ground that it has no funds with which to make the required repairs.<sup>4</sup> The reasoning of the court was that "their poverty was no more a defence than the poverty of an individual is a defence to an action for a breach of contract, or to an indictment for a crime."

Where the statute imposes a specific duty upon a turnpike company, and it fails to exercise due care in the performance

<sup>1</sup> *Houfe v. Fulton*, 29 Wis. 296; *Town of Albion v. Hetrick*, 90 Ind. 545; *Town of Knightstown v. Musgrove*, 116 Ind. 121. The doctrine of *Thorogood v. Bryan*, 8 C. B. 115, has been completely overthrown. *Little v. Hackett*, 116 U. S. 366; *Chartered, etc., Bank v. Netherlands, etc., Co.*, 9 Q. B. Div. 118, 10 Q. B. Div. 521; *Lake Shore, etc., Co. v. Miller*, 25 Mich. 274; *St. Clair, etc., Co. v. Eadie*, 43 Ohio St. 91; *Robinson v. New York, etc., Co.*, 66 N. Y. 11; *Bennett v. New Jersey, etc., R. R.*, 7 Vroom. 225; *Fullman v. Mankato*, 35 Minn. 522; *Pittsburgh, etc., Co. v. Spencer*, 98 Ind. 186.

<sup>2</sup> *Tift v. Jones*, 74 Ga. 469; *Matthews v. Winooski Turnpike Co.*, 24 Vt. 480; *Talmage v. Zanesville, etc., Co.*, 11 Ohio, 197; *Parnaly v. Lancaster, etc., Co.*, 11 Ad. & E. 223.

<sup>3</sup> *Townshend v. Susquehanna, etc., Co.*, 6 Johns. 90; *Murfreesboro, etc., Co. v. Barrett*, 2 Cold. 508. In some of the states greater liability is imposed upon turnpike companies by statute, but we do not care to speak of any other liability than that created by the general rules of law.

<sup>4</sup> *Waterford, etc., Co. v. People*, 9 Barb. 161.

of the duty, or carelessly omits to perform the same, it is liable to one who sustains an injury of which the breach of the statutory duty is the proximate cause.<sup>1</sup> Where the statute requires an act to be done in a specified mode, and the person upon whom this obligation is imposed fails to do what the statute commands, he is guilty of culpable negligence, and must answer for his wrong in damages to one who sustains a special injury, and who is himself free from contributory fault.<sup>2</sup> It is not necessary, to constitute a cause of action, that the statute should command an act to be done, for it may be culpable negligence to do what the law forbids.<sup>3</sup> If a penalty is denounced against the performance of a designated act, it is generally deemed to be forbidden, and one who does the forbidden act may often be deemed guilty of culpable negligence.<sup>4</sup>

The obligation resting on the turnpike company is to make it reasonably safe to travel its road. This means more than that the traveled part of the way shall be kept safe, for where barriers or warnings are necessary to prevent a traveler who exercises ordinary care and prudence from going into danger alongside of and near the way, such barriers must be provided or such warnings given.<sup>5</sup> It is held that it is the duty of the company

<sup>1</sup> *Carver v. Detroit, etc., Co.*, 61 Mich. 584; *Baltimore, etc., Co. v. Crowther*, 63 Md. 558.

<sup>2</sup> This principle is illustrated by many cases. The violation of the command of the law is a positive act, but, as the result is unintended, the wrong may be treated as a negligent one. *Hayes v. Michigan Cent. R. R.*, 111 U. S. 228; *Benegel v. N. Y. Central R. R. Co.*, 14 Alb. L. J. 29; *Penna. Co. v. Conlan*, 101 Ill. 93; *State v. Godwinsville, etc., Co.*, 49 N. J. L. 266, S. C. 60 Am. R. 611; *Penna. Co. v. Hensil*, 70 Ind. 569; *Langhoff v. Milwaukee, etc., R. R. Co.*, 19 Wis. 515; *Carroll v. Staten Island R. R. Co.*, 58 N. Y. 126. A violation of a municipal ordinance may be treated as negligence. *Pennsylvania Co. v. Stegemeir*, 118 Ind. 305; *Wanless v. N. E. R. W. Co.*, L. R. 6 Q. B. 481; *H. L.*

*Cases*, 12; *Railway Co. v. Schneider*, 45 Ohio St. 678; *Baker v. Pendergrast*, 32 Ohio St. 494; *Chicago, etc., Co. v. Hutchison*, 120 Ill. 587; *Toledo, etc., Co. v. Deacon*, 63 Ill. 91.

<sup>3</sup> *Binford v. Johnston*, 82 Ind. 426; *Robertson v. Wabash, etc., Co.*, 84 Mo. 119; *Billings v. Breinig*, 45 Mich. 65; *Correll v. Burlington, etc.*, 38 Iowa, 120; *Williams v. Chicago, etc., Co.*, 64 Wis. 1; *Meek v. Penna. Co.*, 68 Ohio St. 632.

<sup>4</sup> *Carroll v. Staten Island R. R. Co.*, 58 N. Y. 126.

<sup>5</sup> *Ireland v. Oswego, etc., Co.*, 13 N. Y. 526; *Hart v. Hudson, etc.*, 84 N. Y. 56; *Veeder v. Little Falls*, 100 N. Y. 343; *Bronson v. Southbury*, 37 Conn. 199; *Daily v. Worcester*, 131 Mass. 452; *Bunch v. Edenton*, 90 N. C. 431; *Willey v. Ellsworth*, 64 Me. 57; *Beardsley v. Hartford*, 50 Conn. 529.

to prevent the placing of objects along the roadside which are likely to frighten gentle horses.<sup>1</sup> In general, it may be said that it is the duty of the company to construct its road of such a width as that it can be safely used for ordinary travel.<sup>2</sup> It has been adjudged that if there is a defect in the road attributable to the negligence of the company, it is liable to one who sustains an injury, although his horses were running away at the time the injury occurred.<sup>3</sup> There is reason supporting the judgment in the case just referred to, for a wrong-doer ought not to be allowed to take advantage of the probability, or even possibility, that an injury would have occurred, even if he had done his duty and kept the road safe as the law requires. If there must be conjecture or speculation, it should not be adverse to the one who suffers from an accident and favorable to one who has been guilty of a wrong. The presumption is, and ought to be, in favor of the one who is without fault, and against the one who is in fault, although, from causes he could not master, the horses of the former become unmanageable. It comes with an ill grace from one guilty of a breach of duty to assert that "although the immediate and apparent cause of your injury was my illegal act, still, your injury might have resulted had I done my duty." There are decisions in analogous cases which sustain this doctrine.<sup>4</sup>

A traveler rightfully using a turnpike is entitled to protection

<sup>1</sup> *Eggleston v. Columbia, etc., Co.*, 82 N. Y. 278. Decisions in analogous cases support this doctrine, for the leading purpose of the law is to secure a safe road. *Morse v. Town of Richmond*, 41 Vt. 435; *Bartlett v. Hooksett*, 48 N. H. 18; *Foshay v. Town of Glen Haven*, 25 Wis. 288, S. C. 3 Am. R. 73; *Town of Rushville v. Adams*, 107 Ind. 475.

<sup>2</sup> Where the statute prescribes the width a compliance with it will doubtless exonerate the company from liability, unless there is something in the peculiar situation and surroundings requiring a greater width. *Neff v. Mooresville, etc., Co.*, 66 Ind. 279;

*Wayne Union, etc., Co. v. Moore*, 82 Ind. 208. Some of the statements in the opinion in the latter case will hardly bear criticism.

<sup>3</sup> *Baltimore, etc., Co. v. Bateman* 68 Md. 389, S. C. 13 Atl. Rep. 54.

<sup>4</sup> *Sherwood v. Hamilton*, 37 Upper Can. (Q. B.) 410; *Toms v. Whitby*, 35 Upper Can. Q. B. 195; *Ward v. North Haven*, 43 Conn. 148; *Baldwin v. Turnpike Co.*, 40 Conn. 238; *Goshen Turnpike Co. v. Sears*, 7 Conn. 86; *Willey v. Belfast*, 61 Me. 569; *Hunt v. Pownall*, 9 Vt. 411; *Crawfordsville v. Smith*, 79 Ind. 308; *Olson v. Chippewa Falls*, 71 Wis. 558.

from injury by the acts or omissions of agents of the company in charge of its gates. If an agent in charge of a gate wilfully or negligently lets the bar down upon a traveler, the company is liable.<sup>1</sup> The turnpike company is liable if the agent is acting within the line of his duty, although he was not authorized to do the particular act. Thus, where a gate was entrusted to the management of the keeper at all hours, it was held that the company was liable to a traveler injured by the wrongful act of the gate-keeper, although his authority, under a rule of the company to collect toll, ended at 9 o'clock P. M. of each day, and the injury was inflicted after that hour.<sup>2</sup>

The duty of a turnpike company is generally said to be to keep its road reasonably safe for those who use it for travel, but this statement requires some qualification. It is true that the duty is owing to those who lawfully use the way for travel, and not to those who use it for an essentially different purpose.<sup>3</sup> Turnpikes, like other highways, are for the public to travel and not to use for any other purpose than that of travel, but it is not every one who uses the road for travel to whom the company owes a legal duty. It is generally held that this duty is owing only to those who are free from contributory negligence. It is not, at all events, owing to one who attempts to travel the road in an improper or extraordinary manner. If one overloads or loads his wagon in an extraordinary manner he can not recover if the way is reasonably safe for ordinary travel.<sup>4</sup> Roads are required to be made reasonably safe for use in the ordinary mode, and one who makes use of a road in a mode not expected or usual is not only precluded from recovering damages from the owners of the road, but if he injures it by using

<sup>1</sup> *Dudley v. New Orleans, etc., Co.*, 5 La. Ann. 297; *Brannen v. Kokomo, etc., Co.*, 115 Ind. 115. In the case last cited it was held that if the person injured participated with the driver in a wrongful or negligent act the company would not be liable, as the plaintiff must be considered as in fault. In the subsequent case of *Town of Knights-town v. Musgrove*, 116 Ind. 121, the case just referred was discussed and it

was shown that it did not approve the doctrine of *Thorogood v. Bryan*, 8 C. B. 115.

<sup>2</sup> *The Noblesville, etc., Co. v. Gause*, 76 Ind. 142, 5 C. 40 Am. R. 224, and note.

<sup>3</sup> *Blodgett v. Boston*, 8 Allen, 240.

<sup>4</sup> *Fulton Iron Works v. Kimball*, 52 Mich. 146; *Richardson v. Royalton, etc., Co.*, 5 Vt. 580; *Pomeroy v. Fifth, etc., Corp.*, 10 Pick. 35.

it in an improper or unlawful mode, he is liable to the owners, and he may, indeed, be liable to a criminal prosecution.<sup>1</sup>

Turnpikes, like other roads, are for travel, and it is only one who is on them as a traveler that is entitled to exact of the owners the performance of the duty of making the way safe for passage; but it is not always easy to determine who shall be regarded as a traveler within the meaning of the law. One who is in actual use of the road, for the rightful purpose of going from one point to another, may generally be regarded as a traveler, although the distance may be very inconsiderable.<sup>2</sup> The purpose of the person using the way for travel is not material, provided it is a lawful one.<sup>3</sup> Where the duty is prescribed by statute the words "travel" and "traveler" have a more limited and rigid meaning than where the duty is one created by the common law, and the cases resting upon the statute, as do most of the decisions in the New England States, give these words a very narrow meaning.<sup>4</sup> The rule of which we are speaking is not to be extended to streets and alleys in jurisdictions where the duty is not purely statutory, for we here note, but more fully consider elsewhere, that municipal ways are to be made and kept safe for uses which are different from those which may be made of a turnpike.<sup>5</sup> We may also say, to prevent misconception, that the rule, as we are now examining it, is restricted to cases where the question is as to the duty respecting the condition of the road for passage, for a turnpike company may be liable for negligence where the injury is done to one not traveling on the road, as, for instance, to adjoining property, or by wrongfully diverting or obstructing the flow of water. Whatever doubt there may be as to where the line is to be drawn between cases where there is liability and cases

<sup>1</sup> 2 Bishop's Crim. Law, section 1267; Com. Digest, title Chemin, A. 3.

<sup>2</sup> Varney v. Manchester, 58 N. H. 430; Bliss v. South Hadley, 145 Mass. 91; Cummings v. Center Harbor, 57 N. H. 17; Leslie v. Lewiston, 62 Me. 488; Lockett v. State, 47 Ala. 45; Ward v. North Haven, 43 Conn. 154.

<sup>3</sup> Blodgett v. Boston, 8 Allen, 240.

<sup>4</sup> An example is supplied by the cases of Hamilton v. Boston, 14 Allen, 475; Barker v. Worcester, 139 Mass. 74, wherein it was held that walking for exercise is not traveling.

<sup>5</sup> McGuire v. Spencer, 91 N. Y. 306; Chicago v. Keefe, 114 Ill. 222; City of Indianapolis v. Emmelman, 108 Ind. 530.

where there is none,<sup>1</sup> there can be none in a case where the person on the way is using it for a purpose entirely foreign to the purpose for which it was established, since it is clear that in such a case no duty is owing from the turnpike company. Matters incident to the ordinary mode of traveling do not affect the question of liability in cases where the person injured is at the time on his way from one point to another, although at the precise time the injury is received he is not moving along the road. Within the general right of passage is included the right to do such things as are usually done by persons journeying from one place to another.<sup>2</sup>

If the road is taken for a new public use, as, for instance, for a railroad, and this use should materially impair the use of the road for ordinary travel, then the turnpike corporation might, should it so elect, abandon the road and divest itself of the duty which formerly existed.<sup>3</sup> As the government, representing the public, devotes the road to a new public use and thus materially changes the conditions which existed at the time the obligation was assumed, justice dictates that the corporation should have the right to elect whether it will abandon the road, and thus cast off its burden, or continue to bear it. It has been held that the fact that the road of a turnpike company is appropriated for a railroad, and that the railroad was constructed upon it, does not necessarily divest the company of the right to take toll from those who travel its road in the ordinary mode. Where a turnpike company licenses a railroad to use part of its road it is not exonerated from its duty, and the principle which rules in such a case is substantially the same as that which rules where a company assumes by its own act to cast off its duty. The right to collect toll being asserted, it follows that the corporation continues bound to do its duty under the law.<sup>5</sup> It has been

<sup>1</sup> *Donoho v. Vulcan Works*, 7 Mo. App. 447, S. C. 75 Mo. 401.

<sup>2</sup> *Britton v. Cummington*, 107 Mass. 347; *Donoho v. Vulcan Iron Works*, 75 Mo. 401; *Hundhausen v. Bend*, 36 Wis. 29.

<sup>3</sup> *Marsh v. Branch Road*, 17 N. H. 444.

<sup>4</sup> *Hooper v. Baltimore, etc., Co.*, 34

Md. 521. But it does not follow from this ruling that because the corporation may elect to collect toll it is bound to do so, or that its duty necessarily continues unchanged.

<sup>5</sup> *Peoria Bridge Co. v. Loomis*, 20 Ill. 235; *Ammerman v. Wyoming Canal*, 40 Pa. St. 256; *Commonwealth v. Worcester, etc., Co.*, 3 Pick. 327; *Tift v.*

adjudged that the company is liable where the road is temporarily in the occupancy of one engaged in building.<sup>1</sup> If the ownership of the road is changed in good faith and in accordance with the law, the former owners cease to be liable, and for injuries which occur after the change their successors are responsible.<sup>2</sup>

Where the law fixes the corporate existence, or sets bounds to the right to gather toll, the right ceases with the corporate life in the one case, or at the time fixed by the law in the other, and, as a general rule, with the termination of the right to take toll the reciprocal obligation ceases to exist.<sup>3</sup> But where there is an effort by a corporation to rid itself of this obligation before the time designated by law a very different question is presented. There is scant authority upon this point, but this much may with some degree of confidence be said: If a corporation accepts a charter and for a time gathers toll, thus reaping benefit from the franchise granted to it, an obligation is created of which it can not by its own unilateral act, and at its own pleasure, relieve itself.<sup>4</sup> The public are interested, and they have a right to be consulted, and to assert that the obligation assumed shall continue until it lawfully terminates or is removed by due course of law. A turnpike company can not unburden itself by abandoning the road, but the burden assumed will continue until the highway authorities have in some form consented to the abandonment, or have accepted the road as one of the highways belonging to the public. Probably no formal consent or acceptance would be necessary, and it may be that

Town, 53 Ga. 47; *Roxbury v. Worcester*, etc., Co., 2 Pick. 41; *Johnson v. Salem*, etc., Co., 109 Mass. 522; *Matthews v. Winooski*, etc., Co., 24 Vt. 480; *Willard v. Newbury*, 22 Vt. 458; *Wayne*, etc., Co. *v. Berry*, 5 Ind. 286.

<sup>1</sup> *Born v. Allegheny*, etc., Co., 101 Pa. St. 334.

<sup>2</sup> *Bryant v. Biddeford*, 39 Me. 193; *Wellsborough*, etc., Co. *v. Guffin*, 57 Pa. St. 417.

<sup>3</sup> We mean the complete cessation or end of this right, and not a mere temporary suspension, for there may be a

suspension of the right to exact toll caused by the fault of the company and yet no release from the duty assumed by it.

<sup>4</sup> *Reed v. Town of Cornwall*, 27 Conn. 48. The decision in *Ward v. Newark*, etc., Co., 1 Spencer (N. J.), 323, does not oppose this conclusion; all that was there decided is that as long as the company asserts a right to take toll its liability continues, but it can not be inferred from this, that it could divest itself of its legal duty at its own pleasure.



user by the public, without the payment of toll, for a considerable period and with knowledge of the abandonment by the private corporation, would be sufficient to evidence acceptance or consent.<sup>1</sup> It would, it seems to us, require an open and notorious user by the public under claim of right to use the way as a free public road, and that, too, for a very considerable period of time, to exonerate the corporation from liability to a traveler, who, without actual knowledge of the abandonment, should suffer an injury, from a negligent failure to maintain the road, while rightfully traveling over it.<sup>2</sup> But as much as can now be safely done is to offer a suggestion on this point, without asserting a positive opinion. We are not, it is, perhaps, not improper to suggest, speaking of cases where a statute makes provision for the abandonment of turnpike roads, and declares what acts shall constitute an abandonment and relieve the corporation from the obligation to keep the road reasonably safe for travel, for, in such a case, there can be no question of the legislative authority to relieve the corporation from liability for the future, and the only question for solution will be that which arises as to the meaning and effect of the legislative enactment.

<sup>1</sup> *Barton v. Montpelier*, 30 Vt. 650; *People v. Hillsdale, etc., Co.*, 23 Wend. 254.

<sup>2</sup> In the case of *Munson v. Town of Derby*, 37 Conn. 298, it was held that a town remained liable, although it had abandoned the road, to a person injured unless notice of the abandonment was brought home to him, and this fully supports our conclusion, for there is much more reason for applying the rule to a private company than to a public corporation.

## CHAPTER V.

### DEDICATION.

Dedication is the setting apart of land for the public use.<sup>1</sup> It is essential to every valid dedication that it should conclude the owner, and that, as against the public, it should be accepted by the proper local authorities or by general public user.<sup>2</sup> As will be more fully shown hereafter, it is not necessary that the act of the owner should be evidenced in any formal mode, nor that the acceptance of the public should be evidenced by any formal act. There are two general kinds of dedication: 1, Statutory Dedication; 2, Common Law Dedication.

A statutory dedication is one made in conformity to the provisions of a statute. The general rule is, that in order to constitute a valid statutory dedication, the provisions of the statute must be substantially complied with, and such acts as it requires must be performed substantially in the manner prescribed by the legislature. This is necessary to give the dedication validity as a purely statutory dedication, but, in many instances, a dedication invalid as a statutory one will be a good common law dedication.

Where the statute requires that the dedication shall be evidenced by maps or plats, and that they shall be acknowledged before some competent public officer, the failure to acknowledge them will render them invalid as statutory dedications.<sup>3</sup> It is

<sup>1</sup> *Hunter v. Sandy Hill*, 6 Hill (N. Y.), 407, 411; *Bushnell v. Scott*, 21 Wis. 451, S. C. 94 Am. Dec. 555; *Barreau v. West*, 23 Wis. 416, 420; *Dovaston v. Payne*, 2 Smith Lead. Cas. 90, and notes; *Hemphill v. Boston*, 8 Cush. 196; *Rex v. Metlor*, 1 B. & Ad. 32, 37; *Brown v. Gunn*, 75 Ga. 441; *Grogan v. Town of Hayward*, 4 Fed. Rep. 161; *Angell on Highways*, § 132.

<sup>2</sup> Dedication is a term applicable only to public ways.

<sup>3</sup> *Winona v. Huff*, 11 Minn. 119; *Schurmeier v. Railroad Co.*, 7 Wall. 272; *Noyes v. Ward*, 19 Conn. 250; *Des Moines v. Hall*, 24 Ia. 234; *Baker v. Johnston*, 21 Mich. 319; *City of Detroit v. D. & M. R. R. Co.*, 23 *Id.* 173; *Downer v. St. Paul & Chicago R. R. Co.*, 22 Minn. 251; *Grand Rapids v. Hastings*, 36 Mich. 122.

in all cases necessary to follow with some strictness the provisions of the statute, in order to entitle the dedication to the benefit of the legislative provisions upon the subject. Incomplete or defective statutory dedications will often be sustained as common law dedications, and if the roads and streets marked on the defectively executed or recorded plat are accepted by the public, they will become public highways.<sup>1</sup> It seems that even where there is no acceptance on the part of the public they will be regarded as ways, and will be kept open for the benefit of those who have purchased lots with reference to the location and existence of the streets and roads represented upon the maps or plats.<sup>2</sup> If there is no acceptance on the part of the

<sup>1</sup> *Fulton v. Mehrenfeld*, 8 Ohio St. 440; *Gosselin v. City of Chicago*, 103 Ill. 623; *Alvord v. Ashley*, 17 *Id.* 363; *Baker v. Johnston*, 21 Mich. 319; *City of Denver v. Clements*, 3 Col. 472; *Hoole v. Atty. General*, 22 Ala. 190; *Thurston v. St. Joseph*, 51 Mo. 510; *Banks v. Ogden*, 2 Wall. 57; *Maywood Co. v. Village of Maywood*, 118 Ill. 61, S. C. 6 N. E. Rep. 866.

<sup>2</sup> *Common Council of Indianapolis v. Croas*, 7 Ind. 9; *LeClerc v. Gallipolis*, 7 Ohio, 217; *Rowan's Ex'rs v. Portland*, 8 B. Mon. 232; *Smyles v. Hastings*, 22 N. Y. 217; *Matter of Lewis Street*, 2 Wend. 472; *Smith v. Lock*, 18 Mich. 56; *Bartlett v. Bangor*, 67 Me. 460; *Preston v. Navasota*, 34 Tex. 684; *Wiggins v. McCleary*, 49 N. Y. 346; *Bissell v. N. Y. Cent. R. R. Co.*, 23 N. Y. 61, *Point Pleasant Land Co. v. Crammer* (N. J.), 2 Cent. Rep. 746; *Hoboken Land Co. v. Hoboken*, 36 N. J. L. 540. While it is true that in order to bind the public it is essential that there should be some authoritative acceptance, it is not true that any acceptance is required where private rights are acquired upon the faith that public ways have been dedicated which may be opened at once, or at some future time, should the public rep-

resentatives so elect. It is important to bear in mind the difference between public and private rights, for the difference sometimes leads to important consequences. It is clear that it would be unjust to charge the public with maintaining a street or road which it has not accepted, but as a private individual assumes no such burden no acceptance is necessary to fix his rights. As will presently be more fully shown, persons who buy lots according to plats wherein streets are marked acquire irrevocable rights. *Carter v. City*, 4 Oregon, 339; *Meier v. Portland, etc., Co. (Oregon)*, 19 Pac. R. 610. In discussing this general subject in the case last cited, it was said of dedications: "The whole affair from its inception partakes both of a public and of a private nature." It was also said, speaking of the rights of the purchasers of lots that, "Where, however, a town proprietor lays off his land into town lots, indicates streets upon the plat thereof, and offers the lots for sale, he has a purpose to accomplish by dedicating such streets, and that he intends it to be irrevocable is beyond the possibility of doubt. The proprietor expects and the purchasers understand when they purchase, that the streets will forever remain open to the public use."

public, it can not, as it seems to us, be charged with the burden of maintaining the ways, nor without an acceptance by the public can such ways be properly regarded as public highways.

A distinguishing difference between a statutory and common law dedication is said to be that the former operates by way of a grant, and the latter by way of an estoppel *in pais* rather than by grant.<sup>1</sup> If, however, it be correct to affirm as some of the authorities do, that the public can not take by grant, then it can hardly be correct to assert that a statutory dedication operates by way of grant. In many of the States a valid statutory dedication operates to vest the fee in the city, or the county, as the case may be, and this is held to dispense with acceptance on the part of the public.<sup>2</sup> It is not doubted that it is within the power of the legislature to compel governmental corporations to assume the burden of maintaining public ways laid out by individuals pursuant to the provisions of the statute, but it is a power to be carefully guarded, for the public ought not to be burdened with the maintenance of ways laid out by individuals, to gratify their whims or promote their selfish interests. The closer the adherence to the rule requiring an acceptance on the part of the public the better for the public interests. A rule which is, in itself, a wise one and in close analogy with the fundamental principle that one party can not be bound without his assent—a principle which has proved salutary in its practical operation—should be departed from only in the clearest cases and upon the most imperious necessity.

While the donor may vest the fee in the public by a statutory dedication, he is not bound to do so, unless the statute impera-

<sup>1</sup> 2 Dillon's Municipal Corporations, § 628.

<sup>2</sup> *Fulton v. Mehrenfeld*, 8 Ohio St. 440; *Ragan v. McCoy*, 29 Mo. 356; *Baker v. St. Paul*, 8 Minn. 491, 493; *Carter v. City of Portland*, 4 Ore. 339; *Reid v. Edina Board of Education*, 73 Mo. 295; *Brooklyn v. Smith*, 104 Ill. 429; *Rowan's Ex'rs v. Portland*, 8 B. Mon. 232; *Weeping Water v. Reed*, 21 Neb. 261. But unless the statute so provides or it is expressly so stated on

the plat, the public take merely an easement. *Cox v. Louisville, etc., R. R. Co.*, 48 Ind. 178; *Connor v. Prest., etc.*, 1 Blackf. 43; *Smith v. City Council of Rome*, 19 Ga. 89; *Banks v. Ogden*, 2 Wall. 57; *Mankato v. Willard*, 13 Minn. 13. And in Illinois the later cases hold that the fee does not vest until acceptance. *Hamilton v. C., B. & Q. R. R. Co.*, 15 N. E. Rep. 854; *Littler v. City of Lincoln*, 106 Ill. 353.

tively requires it, but may reserve the fee, and grant only an easement to the public.<sup>1</sup> When a fee is granted, the corporation within which the highway is situated takes it in trust for public use and does not acquire an absolute proprietary title.<sup>2</sup> An owner can not, by the terms of his dedication, take the highway from the control of the public corporation entrusted by law with the government and control of highways of like character; thus, a strip of land dedicated for the purpose of a street in a city can not be taken from the control of the city authorities and placed in that of a township trustee, or the supervisor of a road district.<sup>3</sup> In a statutory dedication the donor can not annex to the dedication terms or conditions inconsistent with the statute authorizing such dedications; the effect of annexing such conditions would be to deprive the dedication of its statutory character and make it, in case of acceptance by the public, a common law dedication.

A dedication, either statutory or common law, to a public corporation is not lost by changes in the form of the corporate government, nor by changes in its territorial boundaries.<sup>4</sup> A dedication for the purposes of a public township road will not be lost to the public if a town or city is built up, and the road falls within its limit, nor will it be lost in cases where there is an extension of corporate limits so as to embrace county roads, nor where a village grows into a town or a town into a city. Towns, townships and cities are but trustees of the public, and, as in cases of ordinary trusts, the public trust is not defeated by a change of trustees. Public corporations of the classes mentioned are governmental subdivisions, and changes in their forms, powers and obligations do not deprive the public of their rights in

<sup>1</sup> *Peck v. Providence, etc., Co.*, 8 R. I. 353; *Dubuque v. Benson*, 23 Iowa, 248; *Noyes v. Ward*, 19 Conn. 250; *Manly v. Gibson*, 13 Ill. 312.

<sup>2</sup> *Ransom v. Boal*, 29 Ia. 68, S. C. 4 Am. Rep. 195; *City of Alton v. Ill. Trust Co.*, 12 Ill. 38; *Rowan's Ex'rs v. Portland*, 8 B. Mon. 232, 238; *Vicksburg v. Marshall*, 59 Miss. 563.

<sup>3</sup> *Des Moines v. Hall*, 24 Iowa, 234;

*Schurmier v. Rail R. Co.*, 7 Wall. 272; *Jackson v. Hartwell*, 8 Johns. 422; *Trustees v. Peaslee*, 15 N. H. 317; *Sloan v. McConakay*, 4 Ohio, 157; *North Hempstead v. Hempstead*, 2 Wend. 109.

<sup>4</sup> *County v. Lathrop*, 9 Kan. 453; *Mayor v. St. Bd. Co. Charlt. (Ga.)* 342; *Doe v. Jones*, 11 Ala. 63; *Waugh v. Leech*, 28 Ill. 488; *Briel v. Natchez*, 48 Miss. 423.

public easements, nor in public property, such as school-houses, public squares and the like.

A statutory dedication operates as a conveyance of an easement, except where the statute declares that a fee shall pass, and is, in its essential characteristics a grant of an interest in land, while a common law dedication generally operates by way of estoppel.<sup>1</sup> The one concludes the owner upon compliance with the provisions of the statute under which it was made, while the other concludes him upon the ground that he has suffered the public and individuals to acquire rights upon the faith that he has devoted the land to the use of the public as a road or street. A statutory dedication may be made to take effect in the future,<sup>2</sup> unless there be some provision in the statute to the contrary, so it may be made without naming any grantee, and as against the owner it is valid if executed in substantial, though not literal, compliance with the statute.<sup>3</sup>

An owner who makes a plat on which spaces are left indicating the dedication of roads or streets, and sells lots with reference to the plat, can not recall his dedication, for he leaves the streets to be opened by the proper local authorities at such a time as the public interest may require, and of this the local authorities are the judges.<sup>4</sup> It is for them to determine when

<sup>1</sup> *Denver v. Clements*, 3 Col. 472; *Cincinnati v. White*, 6 Pet. 582; *Town of Paulet v. Clark*, 9 Cranch. 202; *Brown v. Manning*, 6 Ohio, 298, 303; *Oswald v. Grenet*, 22 Tex. 94, 101; *Ford v. Whitlock*, 27 Vt. 265; *Noyes v. Ward*, 19 Conn. 250. But an express dedication, although not statutory, may operate as a grant and as such become irrevocable.

<sup>2</sup> *Mayor of Jersey City v. Morris Canal, etc., Co.*, 1 Beasley, 563; *Trustees of M. E. Church v. Hoboken*, 33 N. J. L. 22; *Town v. Alling*, 40 Conn. 410; *City of Denver v. Clements*, 3 Colorado, 472.

<sup>3</sup> *Derby v. Alling*, 40 Conn. 410; *Police Jury v. Foulhouze*, 30 La. Ann. 64; *M. E. Church v. Hoboken*, 33 N. J. L. 22; *Gebhardt v. Reeves*, 75 Ill. 301.

<sup>4</sup> In the case of *Shea v. The City of*

*Ottumwa*, 67 Iowa, 39, the court said: "But it is urged that there was no acceptance of the dedication by the public, or by the city for the public, for more than thirty years after the dedication, when the street was graded. It is shown that the street remained uninclosed, that the land was rough and hilly, and for that reason it was but little used by the public. It appears that, when the wants of the public demanded it, the city proceeded to grade the street at the point in dispute. It would not do to hold that city streets dedicated to the public over hilly, rough land would revert to the dedicator if they were not improved and used by the public until the wants of the public travel demand it. In some of the cities of this State, there are streets in some portions

the public interests demand that the ways as laid out on the plat shall be taken in charge and improved for public use, but the ways as to those who have purchased lots exist from the time of their purchase. While it is true that a dedication must be accepted within a reasonable time, in order to secure the public right, the sale of lots with reference to the plat fixes the private rights of purchasers. What is a reasonable time depends upon circumstances, as, for instance, where lots are platted near a town the implication is that when the corporate limits are extended, and the ways are required for the public, the town officers may accept the dedication.<sup>1</sup>

Common law dedications may be subdivided into two classes, express dedications and implied dedications. In both express and implied common law dedications it is necessary that there should be an appropriation of land by the owner to public use, in the one case by some express manifestation of his purpose to devote the land to the public use, in the other by some act or course of conduct from which the law will imply such an intent. There are dedications where the intent is expressly manifested, as much so as in ordinary deeds. It is so in cases of recorded plats, not executed pursuant to statute; it may also be so in cases where land is conveyed and it is stated in the deed

thereof over which no vehicle or horseman has passed, and yet they were dedicated more than thirty years ago. They have not been used, because, until graded, they are incapable of use. The dedication will be presumed by the law to have contemplated this state of things and imposed no condition upon the public to use the street until the public wants demanded and secured their improvement." In the case of *Meier v. Portland, etc., Co. (Oregon)*, 19 Pac. R. 610, it was said: "The location of the town site, the number and extent of the streets, and the belief of the purchasers that they will remain permanent and perpetual, are material inducements to the purchase. Nor does the proprietor or the purchasers anticipate that all the streets shown upon the plat will be im-

mediately opened and used. It is generally known and understood that a large portion of them will not be required for many years after the town is laid out; that their necessity will depend upon its future development and growth, and that they will remain in abeyance until the public exigency demands that they be opened and improved."

<sup>1</sup> *Derby v. Alling*, 40 Conn. 410; *Mayor v. Morris, etc., Co.*, 1 Beasley (N. J.), 547. See, also, *Henshaw v. Huntly*, 1 Gray, 203; *Hawley v. Mayor*, 33 Md. 270; *Oswald v. Grenet*, 22 Texas, 94. In the case of the *Trustees, etc., v. The Mayor, etc.*, 33 N. J. L. 1, will be found a very full and able discussion of the general subject.

that a strip is reserved and set apart for a street or alley. Municipal corporations, such as cities, and *quasi* corporations, such as counties, may take by grant for public corporate purposes, and a grant of land for the purpose of a public square, street, road or alley would undoubtedly be sustained as a grant which the corporation might well accept. The grant would vest the title in trust for the public, but it would be none the less an express dedication. If an owner should, by express grant to a city, add a strip of ground to the width of a street or road, there would be a valid dedication, and it would depend upon an express grant. It is not essential to the validity of an express dedication that there should be any precise form of words used, nor that there should be any written instrument; any language and any instrument indicating an intent to set apart the land for the public use would bind the donor from the time of the acceptance by the public.

Where the common law dedication is an express one, and there is a writing evidencing it, the extent of the dedication will be measured by the writing, except where the use controls, and has been of such a character and so long continued as to change the extent of the easement.<sup>1</sup> If the instrument creating the easement annexes terms and conditions, the public is bound by them in case of an acceptance.<sup>2</sup> An express dedication may become effective without immediate use, if it be an unequivocal grant of land for a public highway.

An implied dedication is one arising, by operation of law, from the acts of the owner. It may exist without any express grant, and need not be evidenced by any writing, nor, indeed, by any form of words, oral or written. It is not founded on a grant, nor does it necessarily presuppose one, but it is founded on the doctrine of equitable estoppel. As said by the Supreme Court of the United States, "the law considers it in the nature

<sup>1</sup>Getchell v. Benedict, 57 Ia. 121. See Bell v. Burlington, 68 Ia. 296.

<sup>2</sup>Long v. Battle Creek, 39 Mich. 323; Fisher v. Brouse, 2 Best & S. 780; Boughner v. Clarksburg, 15 W. Va. 394. An express dedication by plat, or otherwise, becomes an irrevocable grant when third persons have acted upon it. As we have seen, this is so in so far as private rights are concerned, although there has been no acceptance by the public, for private rights do not depend upon the acts of the public, or of the local highway officers.



of an estoppel *in pais*,<sup>1</sup> and holds it irrevocable. It may be established by evidence of conduct, and in many ways. In one case it was declared that: "The authorities show that dedications have been established in every conceivable way by which the intention of the party could be manifested."<sup>2</sup> If the donor's acts are such as indicate an intention to appropriate the land to the public use, then, upon acceptance by the public, the dedication becomes complete. It is essential that the donor should intend to set the land apart for the benefit of the public, for it is held, without contrariety of opinion, that there can be no dedication unless there is present the intent to appropriate the land to the public use. If the intent to dedicate is absent, then there is no valid dedication.<sup>3</sup>

The intent which the law means is not a secret one, but is that which is expressed in the visible conduct and open acts of the owner.<sup>4</sup> The public, as well as individuals, have a right to rely on the conduct of the owner as indicative of his intent. If the acts are such as would fairly and reasonably lead an ordinarily prudent man to infer an intent to dedicate and they are so received and acted upon by the public, the owner can not, after acceptance by the public, recall the appropriation. Regard is to be had to the character and effect of the open and known acts, and not to any latent or hidden purpose.<sup>5</sup> If the open and known acts are of such a character as to induce the belief that the owner intended to dedicate the way to public

<sup>1</sup> *Cincinnati v. White*, 6 Peters, 431. See, also, *Morgan v. Railroad Co.*, 96 U. S. 716; *Faust v. City of Huntington*, 91 Ind. 493; *Forney v. Calhoun Co. (Ala.)*, 5 So. R. 750; *McKey v. Village of Hyde Park*, 37 Fed. R. 389.

<sup>2</sup> *Waugh v. Leech*, 28 Ill. 488.

<sup>3</sup> *Hall v. Baltimore*, 56 Md. 187; *Bidinger v. Bishop*, 76 Ind. 244; *Irwin v. Dixon*, 9 How. (U. S.) 10; *Pennington v. Willard*, 1 R. I. 93; *Wilson v. Sexon*, 27 Ia. 15; *Harding v. Hale*, 61 Ill. 192; *Detroit v. R. R. Co.*, 23 Mich. 173; *Mayor of Madison v. Booth*, 53 Ga. 609; *Angell on Highways*, § 142; 2 Greenl. Ev., § 662.

<sup>4</sup> *Dahn v. City of Columbus*, 36 Ind. 330; *City of Indianapolis v. Kingsbury*, 101 Ind. 200; *Morgan v. R. R. Co.*, 96 U. S. 716.

<sup>5</sup> *Elizabethtown, etc., Co. v. Combs*, 10 Bush. (Ky.) 382; *Kingsbury v. City*, 101 Ind. 200; *Denver v. Clements*, 3 Col. 484; *Gamble v. St. Louis*, 12 Mo. 617, 623; *Skrainka v. Allen*, 2 Mo. App. 387, 400; 1 *Addison on Torts*, § 302; *Barraclough v. Johnson*, 8 Ad. & El. 105. See *Curnen v. Mayor*, 79 N. Y. 511, 519; *Shepard v. Shepard*, 36 Mich. 173; *Lamar Co. v. Clements*, 49 Tex. 347.

use, and the public and individuals act upon such conduct, proceed as if there had been in fact a dedication, and acquire rights which would be lost if the owner were allowed to reclaim the land, then the law will not permit him to assert that there was no intent to dedicate, no matter what may have been his secret intent.

If the owner throws open a way to the public, and so conducts himself as to induce a well-founded and reasonable belief that he has a correct knowledge of all the facts, and that, having this knowledge, he intends to dedicate the way to public use, he will be held to have made a dedication in case it appears that others, influenced by his conduct, and acting in good faith and without negligence, have acquired rights in the belief that a dedication had been made, even though it should afterward turn out that the owner acted under a mistake.<sup>1</sup> If, however, there was nothing done by him to mislead others, and if he was without negligence, then he would not be precluded from showing his mistake and avoiding the dedication.

A misconception of the true meaning of the rule that the intent to dedicate must be clearly shown has, it seems to us, carried some courts to erroneous conclusions. While it is true that this intent must always appear to exist, it is not true that it must always in fact exist in the mind of the owner. To hold thus strictly would be to adopt a more rigorous rule than is elsewhere recognized in civil or criminal jurisprudence. Intent is of the very essence of crime, and yet nothing is better settled than that negligence will often supply the place of intent. Thus, if a man throw a log from a window of a building into a street in a populous city and kill another he may be held for murder, although he had no intention of injuring any person.<sup>2</sup> So, if a

<sup>1</sup> *Smith v. State*, 3 Zabr. (N. J.) 712; *Den v. VanHuoten*, 2 *Id.* 61. See, also, 2 *Dillon Munic. Corp.*, § 639; *Jackson v. Perrine*, 35 N. J. Law, 138; *Carr v. Kolb*, 99 Ind. 53; *Gregory v. Knight*, 50 Mich. 61. It is held, however, that where a road has been laid out on a certain line, and an abutting owner by mistake moves his fence too far back,

there is no dedication of the additional land, though the public may have used it for a number of years. *Manrose v. Parker*, 90 Ill. 581. So, it is held, no right by prescription can be claimed in such case if the mistake is mutual. *State v. Crow*, 30 Ia. 258; *State v. Schlib*, 47 Ia. 611.

<sup>2</sup> 1 Bish. Cr. Law, § 314.

man recklessly shoot at a tree in a city park and kill a person whom he did not see, he may be deemed guilty of murder in the second degree.<sup>1</sup> Turning to the civil jurisprudence we find numerous examples of intent deemed to exist, although, in a strict sense, none did exist. If a man holds himself out as a partner he will be bound to third persons although he was not in fact a partner; if a man clothes another with indications of authority as agent he will be bound by the apparent authority, no matter what his real intent was; so, if a man induce another to believe that property is owned by a designated person, he can not afterward deny that fact, no matter what may have been his undisclosed intention. These familiar examples serve to show that in many instances it is the apparent and not the real intent that the law regards. In one of the familiar maxims of the law is expressed a principle that should be applied in cases of dedications, and that is, that a man is presumed to intend the usual and natural consequences of his acts.

There is no reason why sound general principles, found to be wise and salutary in other instances, should not apply to dedications. The subject is comparatively new, and some courts have treated it as though it formed a distinct and independent branch of the law founded upon peculiar principles, and not governed by ordinary legal rules. It will, however, be found on investigation and reflection, that this is an altogether erroneous view. In one case<sup>2</sup> there was a marked and wide departure from sound principle. In that case a strip of ground, in shape, appearance and situation a public alley, connecting with public streets as such, and used as a public alley for seventeen years, was held not to be a public highway, because, as the court said, the owner left the strip unenclosed by mistake. If the court had been guided by the elementary principles which govern analogous cases it would have left the owner to bear the loss of his mistake, and would not have allowed it to fall upon others who had been misled by his acts. The court also declared, that if the way had been used for twenty years there would then have been a valid dedication, but this was an erroneous confounding of rights, for if there had been such a

<sup>1</sup> *Flinn v. State*, 24 Ind. 286.

<sup>2</sup> *Mansur v. Haughey*, 60 Ind. 364.

user for twenty years the question of intent would have been wholly immaterial. The view that user for twenty years is essential to constitute a valid implied dedication is erroneous under the uniform decisions of the same court, for a user for a much shorter time is held sufficient.<sup>1</sup>

It is not necessary that the element of moral or positive fraud should exist in order to estop one who has allowed the public and individuals to act upon his conduct and acquire rights on the faith of it, for, if he has been negligent, he can not defeat the rights of those who have been influenced by his acts and conduct.<sup>2</sup> It is not easy to lay down any general rule upon this subject, but it is safe to say, that if the owner's negligence has misled those who were ignorant of his unexpressed intentions, he must suffer the consequences, and allow the easement to exist upon his land. What degree of negligence will operate to establish a dedication, must, in a great measure, depend upon the facts of each particular case. If the negligence is of such a character as to indicate that want of care which ordinarily prudent men would have exercised under like circumstances, then the owner can not destroy the way, for the public, and the citizens, have a right to expect of him that he will do that which would be done by men of reasonable prudence placed in a like situation. It is not necessary, in any event, that the conduct of the owner should be such as indicates a purpose to mislead or deceive others. The ground upon which implied dedications are sustained does not necessarily involve the good or

<sup>1</sup>City of Evansville v. Evans, 37 Ind. 229; Holcraft v. King, 25 Ind. 352; Mauck v. State, 66 Ind. 177; Strong v. Makeever, 102 Ind. 578. The general rule that a much shorter period will constitute sufficient user, is well settled. See, also, 2 Dillon's Municipal Corp., § 631.

<sup>2</sup>Wilder v. City, 12 Minn. 192; City v. Dahn, 36 Ind. 330; City of Indianapolis v. Kingsbury, 101 Ind. 200; Ross v. Thompson, 78 Ind. 90; City of Denver v. Clements, 3 Col. 484; Morgan v. R. R. Co., 96 U. S. 716. See Curnen

v. Mayor, 79 N. Y. 511, 519. In estoppel *in pais* it is not necessary that there should be an intent or design to mislead; it is sufficient if the party, by passive negligence or active representation, has placed himself in a position in which it would be against equity and good conscience to permit him to gain-say what he had previously passively or actively affirmed. Ward v. Berkshire, etc., Co., 108 Ind. 301; Continental Bank v. National Bank, 50 N. Y. 575; Blair v. Wait, 69 N. Y. 113.

bad faith of the land owner, for, whatever may have been his secret purpose, good or evil, if by his conduct he has induced rightful action upon the part of others, he must be held to the consequences of that which his own acts made appear to the minds of men of fair prudence to have an actual existence. Having created the appearance which has induced others to act, he is in no situation to aver, as against them, that what he made appear to have an actual existence had no existence at all. The element of fraud is present in such cases, although there may have been no design or purpose to deceive in the conduct upon which the public and adjacent proprietors have acted, for the effort to gainsay that conduct is itself against good conscience, and is regarded by courts of equity and law as fraud.<sup>1</sup>

It is no doubt true that if the person against whom the dedication is asserted was ignorant of his rights, and was free from culpable negligence and evil motive, there would be no implied dedication, nor would there be if the person claiming it had full knowledge of all the facts. But even if ignorant of his rights, the owner would be estopped if guilty of culpable negligence.<sup>2</sup>

The intent essential to a valid dedication must be to vest an easement, at least, in the public. Where there is nothing more than a mere license there is no dedication. Where the use is merely permissive, with authority in the owner of the servient estate to put an end to the use at his pleasure, there is no dedication; nor, in such a case, are there such acts as will enable the courts to infer an intent to dedicate.<sup>3</sup> He who claims against the owner of the fee an easement in lands must show either a grant, a continued user for twenty years, or facts from which an intent to dedicate the land can be fairly inferred. While it is true, that the intent to dedicate may be inferred from

<sup>1</sup> *Stevens v. Dennett*, 51 N. H. 324; 67 Ill. 368; *Quinn v. Anderson*, 70 Cal. Anderson v. Hubble, 93 Ind. 570; *Gregg* 454; *Tucker v. Conrad*, 103 Ind. 349; *Wells*, 10 Ad. & E. 90. *Barracrough v. Johnson*, 8 Ad. & El.

<sup>2</sup> This is no more than an application of a familiar principle applicable to all equitable estoppels. 99; *Rozell v. Andrews*, 103 N. Y. 150; *O'Neill v. Annett*, 3 Dutch (N. J.), 291, S. C. 72 Am. Dec. 364.

<sup>3</sup> See *Illinois Ins. Co. v. Littlefield*,

facts without proof of express declarations, yet it is also true that the facts must be such as indicate an unequivocal intent to devote the strip of land to the public use. But the intent which must be shown to be unequivocal is that indicated by the acts, and not that concealed within the mind of the land owner.

It is settled law that while mistakes may be corrected between the immediate parties, or against those who have notice, yet they can not be corrected as against purchasers in good faith, who have acted on the faith of appearances created by the act of the parties. The reason which supports this doctrine is, not that the parties to the deed have been guilty of wrong, but that, having created appearances which have misled others, they are estopped in good conscience to deny the reality of what their conduct indicated. One of the maxims of the law is that, "if one of two innocent parties must suffer by the act of a third, he who enabled the third to occasion the loss must sustain it," and this maxim, Professor Pomeroy says, constitutes "the bed rock of the doctrine of equitable estoppel."<sup>1</sup> There is quite as much reason for applying this rule to dedications of land for public ways as there is for applying it to any other case, and wherever that maxim does apply it is very clear that the question whether there was or was not actual fraud is altogether immaterial. Very many adjudged cases illustrate and apply this equitable maxim, and it will be found that all of them enforce a principle which underlies the whole doctrine of intent in implied dedication. In none of these cases is the element of moral turpitude given consideration against the innocent person, but in all of them the controlling consideration is that the innocent plaintiff who has been misled by appearances, created or suffered by the defendant, although the latter is not guilty of moral wrong, ought not in good conscience be permitted to bear the loss. The general principle which runs through all kindred cases is that he must bear the loss whose conduct has misled one who has acted in good faith, and with care and diligence. If we adhere to this fundamental principle, then our

<sup>1</sup> *Taylor v. Great India Peninsula R. \* gan*, 108 Ind. 419, S. C. 58 Am. R. 49. R. Co., 4 D. & J. 559; *Quick v. Milli-*

conclusion must be that, if the land owner's conduct is such as to indicate to men of ordinary prudence, that there was an intent to dedicate, then the question of evil purpose or fraudulent design ought not to enter into the investigation.<sup>1</sup> It is not, however, to be supposed that the land owner who acts in good faith, and is not guilty of culpable negligence, is to be estopped from contesting the right of the public to the way, but one who knows all the facts, and yet so conducts himself as to induce the belief that he has dedicated the way to the public, can not justly claim to be without fault. The fault is in doing or suffering the things which create the belief, and the element of fraud involving moral turpitude emerges when the attempt is made to deny the conduct and thus entail loss upon those who, themselves free from negligence and wrong, have relied upon the conduct and acquired rights on the faith of what it implied.

The principle which sustains the theory that the doctrine of implied dedication rests upon the open conduct of the owner of the soil, will be found to be an old and well established one. It is thus stated by an elementary writer, who, in speaking of estoppels founded on admissions, says: "It is of no importance whether they were made in express language to the person himself, or implied from the general and open conduct of the party. For, in the latter case, the implied declaration may be considered as addressed to every one in particular, who may have occasion to act upon it. In such cases the party is estopped on grounds of public policy and good faith from repudiating his own representations."<sup>2</sup> This principle is applied to dedication in a forcible and well reasoned case by the Supreme Court of Connecticut.<sup>3</sup>

In another case it was said: "He who induces the public to believe his land a gift, or knowingly permits them to use or treat it as their own, until they have so accustomed themselves, and adjusted their property and accommodated their business to it, that they can not, without detriment, be dispossessed, confers that which he can no more resume without a wrong than he can rightfully seize what was acquired otherwise than by his

<sup>1</sup> Kerr Fraud and Mistake, 136; Swan v. Australian Co., 2 H. & C. 175, 182.

<sup>2</sup> Greenl. Evidence, section 207.

<sup>3</sup> Noyes v. Ward, 19 Conn. 250.

gift. '*Turpe est fidem fallere*,' 'It is base to disappoint the expectations we have authorized,' is the key-note of the common and the civil law of which equity is compounded."<sup>1</sup>

In speaking of implied dedications Professor Greenleaf says: "The right of the public does not rest upon a grant by deed, nor under twenty years possession; but upon the use of the land with the assent of the owner for such a length of time that the public accommodation and private rights might be materially affected by an interruption of the enjoyment."<sup>2</sup> This view of the law is sustained by many adjudged cases.<sup>3</sup> The assent here meant is assent to the use of the land as a road or street fully within the dominion of the public, and not merely permissive use with a right in the owner of the soil to recall the permission at his pleasure. The assent to the use need not, however, as appears from the cases we have cited and the considerations we have stated, be expressly declared, nor be manifested in any particular manner, but may be implied from conduct as in other cases where the issue is as to the rights of the litigants in real property; and in making inferences from conduct, courts and juries are governed by the rules which obtain in such cases.

An owner who dedicates a way to the public neither warrants nor represents that the land is fit for the purpose, but the public takes it as it is granted, and in the condition in which it is at the time of the dedication. If there are excavations or obstructions in the land dedicated the owner is not chargeable with the expense of filling or removing them, nor, after the dedication is fully complete by acceptance and the way has passed under the control of the public authorities, is he responsible for injuries resulting from the unsafe condition of the way, unless he has made it so by some wrongful act.<sup>4</sup>

<sup>1</sup> Parrish v. Stephens, 1 Oregon, 59.

<sup>2</sup> 2 Greenleaf's Evidence, section 662.

<sup>3</sup> City v. Wright, 69 Ill. 318; Smith v. Flora, 64 Ill. 93; Bidinger v. Bishop, 76 Ind. 244; Summers v. State, 51 Ind. 201; State v. Hill, 10 Ind. 219; Hays v. State, 8 Ind. 425; Parrish v. Stephens, 1 Oregon, 59; Mayor v. Franklin, 12 Ga. 239; Case v. Favier, 12 Minn. 89; City of San Francisco v. Scott, 4 Cal. 114;

Panquet v. Lawrence, 11 Ohio St. 274;

Schenley v. Com., 36 Pa. St. 29; Gamble v. St. Louis, 12 Mo. 618; Arrow-smith v. New Orleans, 24 La. Ann. 194.

<sup>4</sup> State v. Society, etc., 44 N. J. L. 502; Fisher v. Prowse, 2 B. & S. 770; 31 L. J. Q. B. 219; Robbins v. Jones, 15 C. B. (N. S.) 221; Cornwall v. Metrop. Com. of Sewers, 10 Exch. 771.



A dedication may be presumed against the State or nation in lands owned by it in the capacity of a private proprietor. This may be considered the general rule, but it is to be taken with some qualifications to be hereafter discussed. In an English case<sup>1</sup> it was said by the Chief Justice, Lord Denman, that: "The Crown may certainly dedicate to the public, and be bound by acquiescence in long public user. I think the public are not bound to inquire whether this or that owner would be more likely to know his rights and to assert them; and that we have gone quite wrong in entering upon such inquiry. Enjoyment for a great length of time ought to be sufficient evidence of dedication unless the state of the property has been such as to make dedication impossible." As a general rule, dedication of ways over the national domain can not be implied against the United States,<sup>2</sup> and there are doubtless other cases where dedication can not be presumed, because the situation and surroundings are such as to forbid it.

Where the State or nation enters into a contract, or acquires property for a purpose not essentially public, the rules applicable to private persons under like conditions apply, in a general sense, to the State or nation. It is not strictly accurate to say that the property is held as private property, for a State or nation can not, in a strict sense, be said to hold property for private purposes, but there is a distinction between purposes purely public and purposes of a private nature. Thus, if the State should take land for the purpose of a public way the purpose would be essentially public, but if it should buy in land sold upon the foreclosure of a mortgage executed to it, or should take property in payment of a debt due to it, the purpose for which the property would be held would be, in a qualified sense, private. It is not always easy to discriminate between public and private rights of the State in land, nor to accurately define the term "private property" when used in this connection.

<sup>1</sup> *Regina v. East Mark*, 11 Ad. & E. N. S. 876. See, also, *Boston v. Le-craw*, 17 How. 426; *Oswego v. Oswego Canal Co.*, 6 N. Y. 257.

<sup>2</sup> See *Phipps v. State*, 7 Blackf. 512;

*Bigelow v. Hillman*, 37 Me. 52. By "national domain" we mean the wild unclosed lands of the United States, and not property which it devotes to what may be called private uses.

There is, however, a recognized distinction between the two rights, public and private, but, for lack of precision in our legal terminology, it is impossible to fully exhibit it in words. The cases in which the discussion of the general subject most frequently occurs are those in which the rights and liabilities of public corporations are concerned, and, while it is true that the same rules can not be applied to the State that prevail where the interests of public corporations, such as towns, cities, and counties, are involved, still these discussions furnish illustrations of the nature of the distinction.<sup>1</sup>

The character of the holding by the State must always exert an important influence upon the question of dedication. We think it safe to say that a dedication can never be presumed where the land is held by the State for a purely public purpose, and where the effect of dedication would be to create a way incompatible with that purpose, or to materially interfere with it. Where the land is held for a private purpose, using the term "private purpose" in the qualified sense heretofore spoken of, dedication may be presumed under circumstances substantially the same as those under which it might be implied against a private citizen. Public corporations, although they are really local governmental bodies, do not stand upon the same footing with the State, and dedications may be implied against them, under the like facts and conditions as in cases against individuals. This, of course, is not to be understood as intimating that there may not be something in the situation and character of the land of a public corporation, and the terms upon which it is held, that would absolutely forbid the presumption of a dedication. Whether the owner of the land be the State itself, or some one of the local political organizations of the commonwealth, there will be, it is obvious, in the very nature of its constitution, and the tenure of its holding, an element which will always make the case unlike that of an individual land owner, and it can not, therefore, be strictly correct to say that the rules are the same as those which apply in

<sup>1</sup> *Holliday v. Frisbie*, 15 Cal. 630; *Davenport v. Ins. Co.*, 17 Iowa, 176; *Foster v. Fowler*, 60 Pa. St. 27; *New Orleans v. Insurance Co.*, 23. La. Ann. 61; *President, etc., v. Indianapolis*, 12 Ind. 620; *Green v. Marks*, 25 Ill. 204.

cases against individuals, but it is safe to say that the rules are substantially the same. This will be granted when it is brought to mind that where the rights of citizens are concerned, much depends upon the condition of the owner, the locality, character, and surroundings of the property, and that all these things are to be taken into consideration in determining whether there was the *animus dedicandi*, or an estoppel concluding the owner from denying the apparent intent indicated by his acts.

Whether an implied dedication can be presumed against a married woman is a question not free from difficulty. In one of the courts it is held, that, as the statute expressly prohibits a married woman from conveying her land except by deed, in which her husband joins, she can not be bound by an estoppel *in pais*, and this doctrine, carried out in logical strictness, would lead to the conclusion that she could not be bound by an implied dedication.<sup>1</sup> Even in that court there has been much conflict of opinion upon the question,<sup>2</sup> and it is doubtful whether the court would not relax the rule in cases where the facts were clear, the public interest important, and the necessity imperious.

We think there may be cases in which married women may be estopped, by their conduct, to deny the right of the public on the highway, but that, in order to produce this result, the evidence should make a stronger case than if the dedication were asserted against one not under legal disability. The weight of authority sustains the doctrine that a married woman may be bound by an estoppel *in pais*, although it is perhaps true that stronger circumstances are required to be shown than in the case of one fully competent to contract.<sup>3</sup> If it be true that a

<sup>1</sup>Behler v. Weyburn, 59 Ind. 143; Shuman v. Springate, 67 Ind. 115.

<sup>2</sup>Gatling v. Rodman, 6 Ind. 289; Scranton v. Stewart, 52 Ind. 68; King v. Rea, 56 Ind. 1.

<sup>3</sup>Stafford v. Stafford, 1 De G. & J. 193; Drake v. Glover, 30 Ala. 382; Bigelow v. Foss, 59 Me. 162; Cravens v. Booth, 8 Tex. 243; Cooley v. Steele, 2 Head. 605; Conolly v. Branstler, 3 Bush. (Ky.) 702; Shivers v. Simmons, 54 Miss. 520, S. C. 28 Am. Rep. 372;

Towles v. Fisher, 77 N. C. 443; Farrow v. Farrow, 1 Dela. Ch. 457, Howell v. Hale, 5 Lea (Tenn.), 405, Patterson v. Lawrence, 90 Ill. 174, S. C. 32 Am. Rep. 22; Elmendorf v. Lockwood, 57 N. Y. 322; 2 Pom. Eq., § 814; 2 Bishop Married Women, § 490. But see Bemis v. Call, 10 Allen, 512; Lowell v. Daniels, 2 Gray, 161; Innis v. Templeton, 95 Penn. St. 262, S. C. 40 Am. Rep. 643; Davison's Appeal, 95 Pa. St. 394.

*feme covert* may be estopped by matter *in pais*, then it must follow that a dedication may be presumed, for it rests upon the same principle.<sup>1</sup> There is a plain distinction between an implied dedication and an express one, and it by no means follows that, because a married woman can not make an express dedication, none can be presumed against her. In the case of an implied dedication she is held bound, because it would be a fraud upon the rights of others to permit her to gainsay her conduct and deprive them of rights acquired upon the faith of what her acts and declarations implied. Where the conduct of the *feme covert* has been such as would make it a fraud upon the rights of others to suffer her to reclaim the way, then she should not be permitted to commit the wrong, and thus deprive those who had been induced to act in reliance on her conduct of their rights.<sup>2</sup>

The rights of married women have been greatly enlarged in many of the States by enabling statutes, and where such statutes are in force her rights are to be determined by the provisions of those statutes.<sup>3</sup> Where the statute authorizes her to deal with her separate real estate as if she were a *feme sole*, there can, of course, be no question as to her right to make an express dedication, and none as to the right of the public to assert an implied dedication against her. If the opening of the way would improve her adjoining land, then it should, in our opinion, be held that she is authorized to make it under statutes denying a right of alienation, but conferring a right to improve her separate property.

<sup>1</sup> See *Schenley v. Com.*, 36 Pa. St. 29; *Ward v. Davis*, 3 Sandf. (N. Y.) 502; *City v. Kingsbury*, 101 Ind. 200; *The Indiana, etc., Co. v. Allen*, 113 Ind. 581.

<sup>2</sup> This is certainly the rule under the statutes enlarging the rights of married women. *Long v. Crosson*, 119 Ind. 5; *Rogers v. Union Central Co.*, 111 Ind. 343; S. C. 27 Am. Law Reg. 50, and note; *Lane v. Schlemmer*, 114 Ind. 296; *Jones v. Frost, L. R.*, 7 Ch. App. 113; *Sharpe v. Foy, L. R.*, 4 Ch. App. 35; *Coal Co. v. Pasco*, 79 Ill. 170; *Schwartz*

*v. Saunders*, 46 Ill. 18; *Drake v. Glover*, 30 Ala. 382; *Lyman v. Crawford*, 15 Iowa, 233; *Touless v. Fisher*, 77 N. C. 443; *Hoxie v. Price*, 31 Wis. 82; *Reagan v. Holliman*, 34 Texas, 403; *Witbeck v. Witbeck*, 25 Mich. 439.

<sup>3</sup> See as to estoppel under these statutes: *Fryer v. Rishell*, 84 Pa. St. 521; *Baum v. Mullen*, 47 N. Y. 577; *Rowe v. Smith*, 45 N. Y. 230; *Hagebush v. Ragland*, 78 Ill. 40; *Godfrey v. Thornton*, 46 Wis. 677.

Infants may be estopped by matters *in pais*,<sup>1</sup> and, as dedications are but instances of the application of the general principle of equitable estoppel, it must follow that there may be cases in which an implied dedication may be successfully asserted against infants. Ordinarily there can be no dedication established against a person of non-age; it is, indeed, only in very rare and peculiar cases that a dedication can be presumed against a person under such a legal disability. The case made should be so strong as to exhibit actual fraud involving an evil design and corrupt purpose.

In analogy to the rules which prohibit persons under disability from conveying lands it is generally held that express dedications can not as a general rule be made by infants, married women, or persons of unsound mind.<sup>2</sup> It seems clear that this must be the general rule, but we believe that this general rule is not entirely without its exceptions, since to hold otherwise would be to invest such persons with rights in a particular class of cases without any reason or principle supporting the exception. Where, however, the law permits a married woman to convey her separate estate she may, no doubt, make an express dedication, and this would be the rule in cases where married women are authorized to execute conveyances in conjunction with their husbands and the wife joins in making the express dedication.

There is strong reason for holding that, under some circum-

<sup>1</sup>Barham v. Tuberville, 1 Swan, 437; Whittington v. Wright, 9 Ga. 23; Story's Eq. Jur., section 385; 2 Smith Lead. Cas. 653; 2 Pom. Eq., section 815; Goodman v. Winter, 64 Ala. 410. It is sometimes said that the doctrine of estoppel is inapplicable to infants. Lachman v. Wood, 25 Cal. 147; Sims v. Everhardt, 102 U. S. 300. But in these and other cases to the same effect the action sounded in contract and not in tort. The case made must be entirely independent of contract. Ferguson v. Bobo, 54 Miss. 121; Dolarque v. Cress, 71 Ill. 380; McBeth v. Trabue, 69 Mo. 642; Gilson v. Spear, 38 Vt. 311;

Fitts v. Hall, 9 N. H. 441; Montgomery v. Gordon, 51 Ala. 377; Spencer v. Carr, 45 N. Y. 406.

<sup>2</sup>Post v. Pearsall, 20 Wend. 111; Baugaon v. Mann, 59 Ill. 492; Todd v. Pittsburgh, etc., R. R. Co., 19 Ohio St. 514; Watkins v. Peck, 13 N. H. 360; Reimer v. Stuber, 20 Pa. St. 453; Melvin v. Whitney, 13 Pick. 184; Lowell v. Daniels, 2 Gray, 168. An Indian is regarded as under legal disability where the consent of a public officer is necessary to the conveyance of property by him, and no valid dedication can be made by him. State v. O'Laughlin, 19 Kansas, 504.

stances, a married woman may make a valid express dedication. Possibly the validity of a dedication could not be rested entirely on the express grant, but there may be such attendant circumstances as appeal so powerfully to equity as to require the courts to sustain the grant to the public. A highway may frequently operate as a betterment of a married woman's estate, and where it does so operate, it may well be sustained upon undeniable principles. A public way may often be appurtenant to the land, and, as such, add very materially to its value.<sup>1</sup> If a married woman should build a mill and dedicate a highway which would afford the only means of access to the mill, we think it quite clear that the way might be considered as appurtenant to the land and a betterment of it, and, if so, there could be no difficulty in upholding the dedication. If the mill property in such a case as that supposed should be sold it seems entirely clear that the grantee would acquire an interest in the highway that could not be taken from him, since to permit that to be done would be to take from him a valuable appurtenance. It must be true that there are cases in which a dedication by a married woman will be upheld, for otherwise settled principles must be disregarded and rank injustice be done by the courts. We are persuaded that a careful analysis of the cases and a just application of just principles will result in the conclusion that there may be cases in which even an express dedication by a married woman will be held effective.

Dedications can only be made by the owner.<sup>2</sup> A person in possession without title can not make an express dedication of the land so as to bind the true owner.<sup>3</sup> One of several tenants in common has no authority to make a dedication,<sup>4</sup> nor

<sup>1</sup> *City v. Kingsbury*, 101 Ind. 200, 221; *Ott v. Kreiter*, 110 Pa. St. 370, S. C. 1 Atl. R. 724.

<sup>2</sup> *Harding v. Town of Hale*, 83 Ill. 501; *Gentleman v. Soule*, 32 Ill. 272, S. C. 83 Am. Dec. 264; *Lee v. Lake*, 14 Mich. 12, S. C. 90 Am. Dec. 220; *Leland v. Portland*, 2 Oreg. 46; *Porter v. Stone*, 51 Iowa, 373; 2 Greenl. Ev., section 663; *Angell Highw.*, section 314; *Ward v. Davis*, 3 Sandf. (N. Y.) 513; *Bushnell v. Scott*, 21 Wis. 457; *Post v. Pearsall*, 20 Wend. 111.

<sup>3</sup> *Cyr v. Madore*, 73 Me. 53; *Gentlemen v. Soule*, 32 Ill. 271, S. C. 83 Am. Dec. 264.

<sup>4</sup> *McBeth v. Trabue*, 69 Mo. 642; *Scott v. State*, 1 Sneed (Tenn.), 629; *City of St. Louis v. Laclede, etc., Co.*, 96 Mo. 197, S. C. 9 Am. St. R. 334.

can one who has a mere equitable right of reversion.<sup>1</sup> It has been held that a mortgagor can not dedicate, and that as to the mortgagee the attempt is ineffective, unless it be shown that he assented.<sup>2</sup> If, however, the mortgagee releases part of the mortgaged premises, describing it as bounded on the street dedicated by the mortgagor, he will not be permitted to afterwards dispute the right of the public to the street.<sup>3</sup> A tenant can not dedicate a way over the land of his landlord.<sup>4</sup> Where, however, the landlord has notice of the act of the tenant, and where there is long continued use by the public without objection, a dedication may be presumed as against both the landlord and the tenant.<sup>5</sup> Mr. Woolrych, in commenting on the case we have referred to, says: "Here it is obvious that the landlord had several opportunities of prohibiting the public passage which he neglected, and notice to the steward was notice to the landlord." A tenant in possession has an interest which the landlord can not impair, during the term, by a dedication without the tenant's consent. This question has not been expressly decided so far as we can ascertain, but Lord Mansfield has indicated an opinion upon it,<sup>6</sup> and his opinion is in harmony with the rules which protect a tenant's right in cases of seizure under the right of eminent domain, as well as with the elementary principles which secure his right of possession against invasion by the landlord.

The owner of the equitable estate may make a dedication which will be effective. This is so in all cases where the full beneficial interest is in him, although the naked legal estate may be in a trustee,<sup>7</sup> but there are cases in which a trustee may

<sup>1</sup> *Tapert v. Detroit, etc., Co.*, 50 Mich. 267.

<sup>2</sup> *Hoole v. Atty. General*, 22 Ala. 190; *City of Moberly v. McShane*, 18 Central L. J. 17, S. C. 79 Mo. 41, 7 Am. & Eng. Corp. Cas., 405; *Detroit v. R. R. Co.*, 23 Mich. 173.

<sup>3</sup> *Vreeland v. Torrey*, 34 N. J. Eq. 312. To same effect, *Bushnell v. Scott*, 21 Wis. 457.

<sup>4</sup> *Gentlemen v. Soule*, 32 Ill. 271, S. C. 83 Am. Dec. 264; *Wood v. Veal*, 5

B. & A. 454; *Harper v. Charleswirth*, 4 B. & C. 591.

<sup>5</sup> *Rex v. Barr*, 4 Campb. 16; *Woolrych Ways*, 10; *Davis v. Stephens*, 7 Carr & P. 570.

<sup>6</sup> *Woodyer v. Hadden*, 5 Taunt. 126; *Woolrych Ways*, 9.

<sup>7</sup> *City of Cincinnati v. White*, 6 Peters, 431; *Williams v. First Presbyterian Society*, 1 Ohio St. 478; *Baker v. St. Paul*, 8 Minn. 491; *Hannibal v. Draper*, 15 Mo. 638; *Ragan v. McCoy*, 29

make a dedication.<sup>1</sup> If one claiming to be the owner should make a dedication it would undoubtedly operate against him if he should afterward acquire the title, although at the time the dedication was made he had, in fact, no title.<sup>2</sup> An executor, or an administrator authorized to take the land for the purpose of selling it to pay debts, may make a valid dedication.<sup>3</sup> The owner of a particular estate can not bind the remainder man by a dedication, but if the latter assent it is otherwise.<sup>4</sup> An agent possessing authority may set apart the principal's land to public use, and a ratification will validate the act although there was originally no authority to perform it.<sup>5</sup> If the principal recognizes a plat laid out by the agent and sells lots with reference to it, he will be deemed to have ratified the acts of the agent.<sup>6</sup> A guardian acting under the sanction of the court may make a dedication of the ward's land.<sup>7</sup>

The State may, of course, make a valid dedication of a way, through lands of which it is the proprietor,<sup>8</sup> and so, also, may counties, towns, cities, and townships. All public corporations unless prohibited by statute, have power to devote to the public use for streets and roads lands of which they are owners, and they may make dedications by grant or in the manner prescribed by statute.<sup>9</sup> Private corporations may make dedications unless forbidden by some provision in their charter, or the statute under which they are incorporated.<sup>10</sup> Where public cor-

Mo. 356; *Johnssone v. Scott*, 11 Mich. 232; *Doe v. Attica*, 7 Ind. 641; *Dover v. Fox*, 9 B. Mon. (Ky.) 200; *Wright v. Tukey*, 3 Cush. 290.

<sup>1</sup> *Prudden v. Lindsley*, 29 N. J. Eq. 615.

<sup>2</sup> *Nelson v. Madison*, 3 Biss. 244. Compare *Lee v. Lake*, 14 Mich. 12, S. C. 90 Am. Dec. 220.

<sup>3</sup> *Logansport v. Dunn*, 8 Ind. 378; *Earle v. New Brunswick*, 38 N. J. L. 47.

<sup>4</sup> 2 *Smith's Leading Cases*, 95; *Rives v. Dudley*, 3 Jones Eq. (N. C.) 126, S. C. 67 Am. Dec. 231; *Detroit v. Railroad Co.*, 23 Mich. 173.

<sup>5</sup> *United States v. Chicago*, 7 How. 185; *Barclay v. Howell's Lessee*, 6 Peters, 498; *Bartean v. West*, 23 Wis. 416.

See, also, *Wirt v. McEnery*, 6 Am. & Eng. Corp. Cas. 105.

<sup>6</sup> *Brown v. Manning*, 6 Ohio, 298.

<sup>7</sup> *Earle v. Mayor*, 38 N. J. Law, 47; *Clark v. Parker*, 106 Mass. 554; *City v. Kingsbury*, 101 Ind. 200, 205.

<sup>8</sup> *Boston v. LeCraw*, 17 How. 426; *Harper v. Charlesworth*, 4 B. & C. 574.

<sup>9</sup> *Story v. N. Y. Elevated R. R.*, 90 N. Y. 122; *Boston v. LeCraw*, 17 How. U. S. 426; *Board v. Huff*, 91 Ind. 333; *Mayor v. Franklin*, 12 Ga. 239; *State v. Woodward*, 23 Vt. 92; *Wright v. Victoria*, 4 Tex. 375; *San Francisco v. Calderwood*, 31 Cal. 585.

<sup>10</sup> *Williams v. N. Y., etc., Co.*, 39 Conn. 509; *Canal Co. v. Hall*, 1 M. & Gr. 393; *Green v. Canaan*, 29 Conn. 157.



porations plat grounds and lay off streets, public squares, parks or the like, they will be held to have dedicated the land to the public, and they will not be permitted to revoke the dedication. In this respect they occupy the same positions as private persons would under like circumstances be deemed to occupy, and they possess no more power or right to revoke the dedication than would private persons similarly situated.<sup>1</sup>

A married woman can not claim dower in lands dedicated by her husband to the public.<sup>2</sup> It is settled that dower is created by law and does not exist by virtue of contract, and that it is, therefore, within the power of the legislature to change or destroy the rights of a married woman at any time before they have vested.<sup>3</sup> This rule prevails where dower has been abolished and an estate in fee substituted.<sup>4</sup> Dedication of land to public use is placed upon the same general principle as that on which rests the right of eminent domain, and it is held that the property interests of the married woman must yield to the public necessity.<sup>5</sup>

It is not necessary that there should be any grantee or donee *in esse* to take the fee, nor is it necessary that the legal title should pass out of the owner; "the rights may exist in the public and have no other limitation than the wants of the community at large."<sup>6</sup> Where land is dedicated to the public it will pass to a corporation created for the government of the locality by operation of law. When the inhabitants of a particular locality are invested with the government thereof, by the erection

<sup>1</sup> State v. Woodward, 23 Vt. 92; Story v. Elevated R. R., 90 N. Y. 122.

<sup>2</sup> Gwynne v. Cincinnati, 3 Ohio, 25; Moore v. Mayor, 8 N. Y. 110; Mankato v. Meagher, 17 Minn. 265.

<sup>3</sup> Strong v. Clem, 12 Ind. 37; May v. Fletcher, 40 Ind. 575; Magee v. Young, 40 Miss. 164; Lucas v. Sawyer, 17 Ia. 517; Cunningham v. Wilde, 56 Ia. 369; Ware v. Owens, 42 Ala. 212; Barbour v. Barbour, 46 Me. 9. But see Leary v. Laffin, 101 Mass. 334; Sutton v. Askew, 66 N. C. 172.

<sup>4</sup> Duncan v. City of Terre Haute, 85

Ind. 104. Compare Simar v. Canaday, 53 N. Y. 298, 304.

<sup>5</sup> 2 Dillon Municipal Corp. (2d ed.), 459; 1 Scribner on Dower, 582; Wheeler v. Kirtland, 27 N. J. Eq. 534; Melizet's Appeal, 17 Pa. 449; Kenesly v. Mo. Ins. Co., 11 Mo. 204.

<sup>6</sup> New Orleans v. U. S. 10 Peters, 661; Town of Paulet v. Clark, 9 Cranch, 292; Lade v. Shepherd, 2 Stra. 1004; Beatty v. Kurtz, 2 Peters, 565; Doe v. Jones, 11 Ala. 63; Dubuque v. Maloney, 9 Ia. 450; Carter v. Portland, 4 Ore. 339; Coffin v. City of Portland, 27 Fed. Rep. 412.

of a corporation, the law invests the corporation with title to the ways of the locality in trust for the public for the use to which they were set apart by the owners of the fee, when they dedicated the land to the public.<sup>1</sup> An owner may grant whatever estate he sees fit, and may annex conditions and limitations to his grant at his pleasure, provided that such limitations and conditions are not inconsistent with the dedication and will not defeat the operation of the grant.<sup>2</sup> A condition or limitation which would render the dedication ineffectual can not be annexed, thus a man can not reserve possession to himself, nor reserve a right to do anything in the way which will destroy its character as a public way.<sup>3</sup> Nor can there be a valid dedication to a part only of the public, since this would be repugnant to the purpose of the dedication, and by limiting the right to use the way to designated individuals or classes of persons, the general public would be excluded, and this would render it impossible for the public to complete the dedication by an acceptance.<sup>4</sup>

The donor can not, as we have already seen, annex to the dedication a condition that the way shall be under the control of other public or corporate officers than those invested by law with the government of the local territory within which the ways are situated, nor can he annex any condition which will have the effect to take from the proper local authorities the power to improve the way in the same mode as other public ways of the

<sup>1</sup> *County Commissioners v. Lathrop*, 9 Kan. 453; *Mayor v. Steamboat, Charl.* (Ga.) 342; *Doe v. Jones*, 11 Ala. 63; *Klinkener v. School District*, 1 Jones (Pa.), 444; *Waugh v. Leech*, 28 Ill. 488; *Canal Trustees v. Havens*, 11 Ill. 554; *Maywood Co. v. Village of Maywood*, 118 Ill. 61, S. C. 6 N. E. Rep. 866.

<sup>2</sup> *Rex v. North Hampton*, 2 M. & S. 262; *Rex v. Hudson*, 2 Stra. 209; *Trustees v. Mayor*, 33 N. J. L. 13, S. C. 97 Am. Dec. 696; *Antones v. Eslava*, 9 Porter (Ala.), 527; *Mowry v. Providence*, 10 R. I. 52; *Mercer v. Woodgate*, L. R., 5 Q. B. 26; *Arnold v. Blaker*, 6 Q. B. 433; *Fisher v. Brown*, 31 L. J. Q. B.

213; *Hemphill v. Boston*, 8 Cush. 195; *Valentine v. Boston*, 22 Pick. 75; *Pettibone v. Hamilton*, 40 Wis. 402.

<sup>3</sup> *Fitzpatrick v. Robinson*, 1 Hudson & Brook, 565; *Blundell v. Cotterall*, 5 B. & A. 315; *Rex v. Leake*, 2 Nev. & M. 595; *Dawes v. Haskins*, 8 C. B. N. S. 248.

<sup>4</sup> *Poole v. Huskisson*, 11 M. & W. 827; *Tupper v. Huson*, 46 Wis. 646; *Trerice v. Barteau*, 54 Wis. 99; *Tallmadge v. East River Bank*, 26 N. Y. 105; *Trustees v. Hoboken*, 33 N. J. Law, 13; *Ill. Ins. Co. v. Littlefield*, 67 Ill. 368.

locality are improved.<sup>1</sup> In such cases the general rule is that the condition will fall and the grant stand. Subject to the limitation we have stated, the dedication must, as the law phrase runs, be accepted *secundum formam doni*.<sup>2</sup> It is stated in general terms, in some of the cases, that there may be a partial acceptance,<sup>3</sup> but it seems to us that this doctrine must be taken with some qualification. If the donor should consent that the public might accept part and reject part, then, doubtless, the acceptance, if for the public generally, would be valid, but if he should insist on a full acceptance we think that on principle he would be sustained by the courts, since to hold otherwise would be in effect to compel him to part with his property on terms different from those prescribed in his grant. It is easy to conceive instances in which the land owner would be benefited by an acceptance of the dedication as proposed, but not benefited if it were limited or accepted only partially.

The presumption in cases where there is no express stipulation defining the estate granted, is that the public takes an easement.<sup>4</sup> In cases of implied dedications this presumption obtains. All that can be justly inferred from user is, that the public acquires an estate adequate to the accommodation of the people, and this can not be an estate greater than an easement, since all that the public can reasonably be held to require is such an estate as will vest the right to free and unobstructed use, and an easement will confer this right as effectually as an estate in fee. The owner can not be deemed to grant a greater estate than that which the public use measures, for, as the use is the foundation of the public right, it necessarily determines its extent. In statutory dedications the fee may vest in the public, although no express words creating such an estate are

<sup>1</sup> *Richard v. Cincinnati*, 31 Ohio St. 506; *City of Des Moines v. Hall*, 24 Ia. 234; *Jackson v. Hartwell*, 8 Johns. 422; *Trustees v. Peaslee*, 15 N. H. 317; *Sloan v. McConahay*, 4 Ohio, 157.

<sup>2</sup> *Barraclough v. Johnson*, 3 Nev. & Perry, 233, per Abbott, C. J.; *Roberts v. Karr*, 1 Campbell, 262; *Rex v. Leake*, 2 Nev. & M. 595.

<sup>3</sup> *State v. Trask*, 6 Vt. 355; Ang. on Highways, section 157.

<sup>4</sup> *Schurmier v. R. R. Co.*, 10 Minn. 104, S. C. 7 Wall. 272; *Dubuque v. Benson*, 23 Iowa, 248; *Peck v. Providence, etc.*, 8 R. I. 353; *Peck v. Smith*, 1 Conn. 103; 4 Viner's Abridg. 502; *Goodtitle v. Alker*, 1 Burr. 133.

used, but this is only so in cases where the statute under which the dedication is made provides that the fee shall vest.<sup>1</sup>

Dedications by maps and plats are sometimes so made as to render it difficult to determine their nature and extent. We think it a safe general rule to resolve doubts in such case against the donor, and, within reasonable limits, to construe the dedication so as to benefit the public rather than the donor. Naturally the presumption is that one who records a plat, and marks upon it spaces that appear to form no part of any of the platted lots, dedicates the land represented by the spaces thus excluded to a public use.<sup>2</sup> In one of the decided cases the plat showed a triangular piece of ground neither numbered nor designated as a lot, and it was held that the parcel of ground was dedicated to the public.<sup>3</sup> In another case, an open space was left undesignated on the map and it was held that there was an effective dedication.<sup>4</sup> A map, in another case, left a space not designated, but the lines followed the bend of a river, and the court held that there was a dedication of the undesignated space to the public use.<sup>5</sup> It

<sup>1</sup> *Wisby v. McCoy*, 19 Ohio St. 238; *Fulton v. Mehrenfield*, 8 Ohio St. 440; *Brown v. Manning*, 6 Ohio, 298; *Baker v. St. Paul*, 8 Minn. 491; *Maywood, etc., Co. v. Maywood*, 118 Ill. 61, S. C. 6 N. E. Rep. 866. As to the right of the dedicator to simply grant an easement, and to reserve other interests in the land to himself, unless prohibited by statute, see *Dubuque v. Benson*, 23 Iowa, 248; *Manly v. Gibson*, 13 Ill. 308.

<sup>2</sup> *City of Denver v. Clements*, 3 Col. 484; *Barracrough v. Johnson*, 8 Ad. & E. 99. See opinions of Littledale and Coleridge J. J.; *Elizabethtown, etc., Co. v. Combs*, 10 Bush. (Ky.) 382; *Noyes v. Ward*, 19 Conn. 250; *Gamble v. City*, 12 Mo. 617; *City of Indianapolis v. Kingsbury*, 101 Ind. 200. Compare *Pella v. Scholte*, 24 Iowa, 283; *David v. New Orleans*, 16 La. Ann. 404; *Smith v. Portland*, 30 Fed. Rep. 734.

<sup>3</sup> *Hanson v. Eastman*, 21 Minn. 509.

<sup>4</sup> *Sanborn v. Chicago, etc., Co.*, 16 Wis. 19.

<sup>5</sup> *Yates v. Judd*, 18 Wis. 118. In *Fisher v. Carpenter*, 36 Kan. 184, a different view of the question from that declared in the cases cited and that stated in the text was taken, but we can not regard that case as well decided. It loses sight of the familiar rule that an ineffectual statutory dedication may be valid as a common law dedication. *Meier v. Portland Cable Co. (Oregon)*, 1 Lawyers Rep. Annotated, 856, and notes. The cases cited do not sustain the conclusion of the court. In *Mayor v. Stuyvesant*, 17 N. Y. 34, the point decided was that the failure to take possession of an undesignated space would be deemed to defeat the right of the public. In the case of *Cook v. The Village*, 7 Mich. 115, the line of the highway marked on the plat terminated at the mill lot of the plaintiff, and it was rightly held that the way did not extend across the lot. The strip marked on the plat under consideration in *Rob-*

is, of course, competent for the donor to prevent a presumption that open and undesignated spaces on the map or plat are set apart to the public,<sup>1</sup> but where a dedication is fairly inferable it may be deemed to have been made, although there may be a lack of formality or a failure to clearly express the intention to dedicate. A plat which sets apart highways to the public is equivalent to a conveyance and the easement conveyed is irrevocable.<sup>2</sup>

The lines as exhibited on the plat will control and not the explanatory notes.<sup>3</sup> The extent of a dedication by map or plat is, however, to be determined from a consideration of the whole instrument since the chief object is to ascertain the intention of the donor. The authorities upon the subject of dedication by maps or plats are very numerous and exhibit all sorts of forms and phases. But the cardinal rule of construction is that which prevails respecting ordinary grants, and that is to discover and give effect to the intention of the party as manifested by his acts.<sup>4</sup>

It is not only those who buy land or lots abutting on a street or road laid out on a map or plat that have a right to insist upon the opening of the street or road, but where streets and roads are marked on a plat and lots are bought and sold with reference to the plat or map, all who buy with reference to the general plan or scheme disclosed by the plat or map acquire a right in all the public ways designated thereon and may en-

inson *v.* Coffin, 6 Pac. R. 41, did not open into any street, and all the streets were plainly indicated, and it may well be that in such a case, no dedication could be inferred.

<sup>1</sup> Dexter *v.* Tree, 117 Ill. 532.

<sup>2</sup> Weeping Water *v.* Reed, 21 Neb. 261; Lee *v.* Mound Station, 118 Ill. 304.

<sup>3</sup> Hunter *v.* Eichel, 100 Ind. 463.

<sup>4</sup> We collect a few of the many cases upon the general subject. San Leandro *v.* LeBreton, 72 Cal. 170; Eastland *v.* Fogo, 66 Wis. 133; Hobson *v.* Monteith, 15 Ore. 251; Maywood Co. *v.*

Maywood, 118 Ill. 61; Schneider *v.* Jacobs, 5 S. W. Rep. 350, S. C. 19 Am. & Eng. Corp. Cases, 597; Price *v.* Brackenridge, 92 Mo. 378, S. C. 5 S. W. R. 20; Barrett *v.* Bridge Co., 45 Hun. 202; Hurley *v.* Miss., etc., Co., 34 Minn. 143, S. C. 24 N. W. R. 917; Fulton *v.* Dover, 6 Atl. R. 633; Lennig *v.* Ocean City Association, 41 N. J. Eq. 606; Bissell *v.* New York Central R. Co., 23 N. Y. 61; Wyman *v.* Mayor, 11 Wend. 486; McMannis *v.* Butler, 49 Barb. 176.

force the dedication.<sup>1</sup> The plan or scheme indicated on the map or plat is regarded as a unity and it is presumed, as it well may be, that the public ways add value to all the lots embraced in the general scheme or plan. Certainly, as every one knows, lots with convenient cross streets are of more value than those without, and it is fair to presume that the original owner would not have donated land for public ways unless it gave value to the lots. So, too, it is just to presume that the purchasers paid the added value and the donor ought not, therefore, to be permitted to take it from them by revoking part of his dedication.

In order to make a dedication complete on the part of the public as well as the owner, and to charge the public corporation having jurisdiction over highways with the duty to repair the way, there must be an acceptance of the dedication by the public or the proper local authorities.<sup>2</sup> The owner, may, as a rule, recall his dedication at any time before it has been ac-

<sup>1</sup> *In re Pearl Street*, 111 Pa. St. 565, 5 Atl. R. 430; *Bartlett v. Bangor*, 67 Me. 460; *Rowan v. Portland*, 8 B. Monr. 232; *Wickliffe v. Lexington*, 11 B. Monr. 155; *De Witt v. Ithaca*, 15 Hun. 568; 2 *Smith's Leading Cases* (8 Am. ed.), 161; 2 *Herman on Estoppel*, section 1148. In *Fox v. Union, etc., Co.*, 109 Mass. 292, the general doctrine was applied to a private alley. See, also, *Trutt v. Spotts*, 87 Pa. St. 339; *Huber v. Gazley*, 18 Ohio, 18; *Dubuque v. Maloney*, 9 Iowa, 450. In *Jaqua v. Headington*, 114 Ind. 309, it was held that where a party agreed to open and extend streets, and a definite sum was fixed to be recovered as liquidated damages in case of a breach of the contract, the plaintiff was entitled to recover the sum designated. As we have seen, the doctrine of implied dedication rests mainly upon the doctrine of estoppel. "The law," it was said in *Morgan v. Railroad Co.*, 96 U. S. 716, "considers the owner's acts and declarations as in the nature of an estoppel *in pais* and precludes him from revoking the dedi-

cation." This doctrine is asserted in many cases. *Faust v. City of Huntington*, 91 Ind. 493; *Godfrey v. City of Alton*, 12 Ill. 29; *City of Cincinnati v. White*, 6 Peters, 431; *Rowan v. Portland*, 8 B. Monr. 232; *Holdame v. Trustees*, 21 N. Y. 474. There is, therefore, no valid reason why the benefit of the estoppel may not be invoked by other persons than abutters, for, if they have acquired rights upon the faith of the owner's acts, as against them he is estopped to revoke any part of his dedication to their injury.

<sup>2</sup> *State v. Wilson*, 42 Me. 9; *San Francisco v. Calderwood*, 31 Cal. 585; *Hobbs v. Lowell*, 19 Pick. 405; *Jennings v. Tisbury*, 5 Gray, 73; *Mansur v. Haughey*, 60 Ind. 364; *Remington v. Millard*, 1 R. I. 93; *Tillman v. People*, 12 Mich. 401; *Requa v. Rochester*, 45 N. Y. 129; *Carter v. City of Portland*, 4 Ore. 339; *Curtis v. Hope*, 19 Conn. 154; 2 *Greenl. Ev.*, § 662; *Commonwealth v. Moorhead*, 118 Pa. St. 344, S. C. 4 Am. St. Rep. 599; *Littler v. Lincoln*, 106 Ill. 353.

cepted.<sup>1</sup> Until there has been an acceptance, the public can not be charged with the duty of repairing, nor is there any liability for injuries caused by the defective or unsafe condition of the way.<sup>2</sup> The acceptance must be made by representatives of the public having authority over highways, or by the public by general user of the way. An acceptance by an unauthorized person, or by an officer not possessing authority over the highway, will not bind the public.<sup>3</sup> The officer or body vested by law with jurisdiction over the highways of the locality may bind the municipal corporation, or governmental subdivision, which they represent by an acceptance. Where an acceptance has been manifested by competent authority, then abutters who have acquired substantial rights upon the faith of the establishment of the way may successfully resist an attempt to withdraw the acceptance. This right in the abutters can not accrue until they have acted upon the faith that the highway will continue to exist, but when they have acted and it appears that the discontinuance of the way would work them material injury, they may prevent a discontinuance, or secure compensation for such injuries as arise from the loss of the way. This result follows from the settled principle that abutters secure rights in the highway which constitute property, and of which the legislature can not deprive them without compensation.<sup>4</sup>

<sup>1</sup> *Lee v. Village of Sandy Hill*, 40 N. Y. 442, *Baldwin v. City of Buffalo*, 35 N. Y. 375, *Holdane v. Trustees*, 21 N. Y. 474, *Forbes v. Balenseifer*, 74 Ill. 183; *San Francisco v. Canavan*, 42 Cal. 541.

<sup>2</sup> *City of Oswego v. Oswego Canal Co.*, 6 N. Y. 257; *Folsom v. Underhill*, 36 Vt. 580; *Mayberry v. Standish*, 56 Me. 342, and authorities, note 1 *supra*.

<sup>3</sup> *State v. Bradbury*, 40 Me. 154, *White v. Bradley*, 66 Me. 254, hold that surveyor has no power to accept. Nor can prosecutor by indictment for obstruction. *State v. Carver*, 5 Strob. (S. C.) Law, 217. Nor is an attempted acceptance by the town council good, it not being a proper agent to accept.

*Remington v. Millard*, 1 R. I. 93. See also, *Reed v. Scituate*, 5 Allen, 120; *Trustees v. Otis*, 37 Barb. 50; *Hamilton v. Chicago, etc., R. R. Co. (Ill.)*, 15 N. E. Rep. 854.

<sup>4</sup> *Common Council v. Croas*, 7 Ind. 9; *Story v. N. Y. Elevated R. R. Co.*, 90 N. Y. 122; *Le Clercq v. Gallipolis*, 7 Ohio, 217; *Rowan's Executors v. Portland*, 8 B. Mon. 232; *Town of Rensselaer v. Leopold*, 106 Ind. 29. On this point, as will be seen in the chapter treating of the vacation of highways, there is a stubborn conflict in the authorities, but we think the statement of the text is founded on sound principle.

The acceptance on the part of the public authorities may be either express or implied. An express acceptance is evidenced by some order of the body, or officer, possessing jurisdiction in such matters accepting the dedication in express terms. The order must be within the authority of the officer or body making it, and should, when made by a body, as a common council, board of commissioners, or the like, be made at a legal session, and, in strictness, entered of record. The failure to enter it of record would not defeat the acceptance, unless, indeed, the statute expressly required that this should be done. In proving an express acceptance made by a board of commissioners, or by a common council, or a board of supervisors, the record of the order should be produced.<sup>1</sup> If no record was made, then foundation for the admission of secondary evidence may be laid by due proof of that fact, and when the foundation is thus laid, parol evidence is competent. Where the acceptance is by long continued user, then, of course, it is not necessary to produce record evidence.<sup>2</sup>

An implied acceptance arises in cases where the public authorities have done acts recognizing the existence of the highway, and treating it as one of the public ways of the locality. Where control of a way is assumed by the authorities representing the public corporation, an acceptance will be implied. This assumption of control may be evidenced in many ways, but, in order to constitute an acceptance, it must be such as could only be rightfully exercised over a highway.<sup>3</sup> If the control which is assumed is such only as might be properly exercised over private ways, then there would be no necessary implication of acceptance.

Where the highway is beneficial to the public, an acceptance

<sup>1</sup> *Parsons v. Trustees*, 44 Ga. 529. See *People v. Reed* (Cal.), 20 Pac. R. 708.

<sup>2</sup> *The People v. Loehfelm*, 102 N. Y. 1; *Cook v. Harris*, 61 N. Y. 448; *Holdame v. Trustees*, 21 N. Y. 474; *McMannis v. Butler*, 51 Barb. 436.

<sup>3</sup> *People v. Jones*, 6 Mich. 176; *Detroit v. Railroad Co.*, 23 Mich. 173; *Parsons v. Trustees*, 44 Ga. 529; *Rose v. St. Charles*, 49 Mo. 509; *Buchanan v. Curtis*, 25 Wis. 99, S. C. 3 Am. Rep. 23; *Wright v. Tukey*, 3 Cush. 290; *Shartle v. Minneapolis*, 17 Minn. 308; *Town of Dayton v. Rutland*, 84 Ill. 279, S. C. 25 Am. Rep. 457. Contract by proper officers for improvement of dedicated street is sufficient acceptance. *Cincinnati, etc. R. R. Co. v. Village of Carthage*, 36 Ohio St. 631.



will, in general, be implied.<sup>1</sup> This conclusion is supported by the cases which hold that the acceptance of a deed may be presumed from the beneficial character of the grant, as well as by those which hold that acceptance of bridges may be presumed when they are for the benefit of the public, and it is, in truth, founded on the broad fundamental principle that persons are presumed to accept that which is of benefit to them. The question whether the way will or will not benefit the public is always an important one, for where it appears that it is not needed for the public accommodation, much stronger evidence of acceptance is required than in cases where it appears that it will be of benefit to the public, even though its maintenance may also entail a burden.

One of the principal indications of acceptance is that of improving or repairing the road or street. In one case it was held that digging a public well in the way was evidence of acceptance,<sup>2</sup> and we have no doubt of the soundness of this decision; for no matter what the particular act is, if it be one which could only be rightfully done upon a highway, it should be regarded as evidence of acceptance.<sup>3</sup> Of course, the character of the way and its surroundings are, in such a case, to be given due consideration, as the force of the particular act of control may depend upon the locality and condition of the way. Where an amended charter is accepted, which adds to the mu-

<sup>1</sup> *Guthrie v. New Haven*, 31 Conn. 308; *Hall v. Meriden*, 48 Conn. 416; *San Francisco v. Canavan*, 42 Cal. 541; *Cemetery Asso. v. Meniniger*, 14 Kan. 312; *Child v. Chappel*, 9 N. Y. 246; *Abbott v. Inhabitants*, 143 Mass. 521, S. C. 58 Am. Rep. 143, 146.

<sup>2</sup> *Town Council v. Lithgoe*, 7 Rich. Law, 435. So, letting a contract for the improvement of a dedicated street has been held a sufficient acceptance. *Cincinnati, etc., R. R. Co. v. Village of Carthage*, 36 Ohio St. 631. Grading or working upon the road will show an acceptance. *Brakken v. Minn., etc., Ry. Co.*, 29 Minn. 41. To same effect, *People v. Blake*, 60 Cal. 497; *Steele v.*

*Sullivan*, 70 Ala. 589; *Landis v. Hamilton*, 77 Mo. 554. But, in an action against a city for injuries caused by a defect in a street, evidence that, after the accident, the city had repaired the street was held inadmissible to show a previous acceptance. *Kennedy v. Mayor*, 65 Md. 514, S. C. 57 Am. Rep. 346. Compare *Folsom v. Town of Underhill*, 36 Vt. 580; *Sewell v. City of Cohoes*, 75 N. Y. 45, S. C. 31 Am. Rep. 418.

<sup>3</sup> *Marcy v. Taylor*, 19 Ill. 634; *Commonwealth v. Belding*, 13 Metc. 10; *State v. Atherton*, 16 N. H. 203, and note 3, page 115.

nicipal corporation territory previously laid off and platted, there is an implied acceptance of the streets and alleys designated on the plat.<sup>1</sup> There would, in the instance just stated, be only an implied acceptance if the legislature had given the corporation an election to accept or reject the amendment, but it is within the power of the legislature to compel municipal corporations, and other governmental subdivisions, to accept streets and roads which have been laid out by individuals, and the acceptance could not be denominated an implied one if there were no right of election. Municipal corporations, unlike private corporations, can not elect to accept a charter, but are compelled to receive what the legislature commands.<sup>2</sup>

There has been much diversity of opinion as to whether user by the public will amount to an implied acceptance and cast the burden of maintenance upon the local government. Professor Greenleaf says: "It does not follow, however, that because there is a dedication of a public way by the owner of the soil, and the public use it, the town, or county, or parish, is bound to repair. To bind the corporate body to this extent, it is said that there must be some evidence of acquiescence or adoption by the corporation itself, such as having actually repaired it, or erected lights or guide-posts thereon, or having assigned it to the surveyor of highways for his supervision or the like."<sup>3</sup> This statement, it is noticeable, is a very careful and guarded one, and is indicative of the doubt in the mind of the writer. In another treatise appears language more clearly exhibiting the uncertain state of the law.<sup>4</sup> This uncertainty is removed by the later authorities, and it may now be considered as the prevailing opinion, that an acceptance may be implied from a general and long continued use by the public as of right.<sup>5</sup>

<sup>1</sup> *Des Moines v. Hall*, 24 Iowa, 234; *Requa v. City of Rochester*, 45 N. Y. 129, S. C. 6 Am. Rep. 52.

<sup>2</sup> *Cooley's Const. Lim.\** 395; 1 *Dillon Munic. Corpor.*, §§ 52, 54.

<sup>3</sup> 2 *Greenl. Ev.*, section 662, citing *Rex v. Benedict*, 4 B. & Ald. 447.

<sup>4</sup> *Angell on Highways*, section 159.

<sup>5</sup> *Cook v. Harris*, 61 N. Y. 448; *Peo-*

*ple v. Loehfelm*, 102 N. Y. 1; *Ross v. Thompson*, 78 Ind. 90; *Green v. Elliott*, 86 Ind. 53; *Steele v. Sullivan*, 70 Ala. 589; *Eureka v. Croghan*, 19 Pac. Rep. 84; *State v. Tucker*, 36 Ia. 485; *Carter v. City of Portland*, 4 Ore. 339; *Price v. Breckenridge*, 92 Mo. 378; *Commonwealth v. Moorhead*, 118 Pa. St. 344, S. C. 4 Am. St. Rep. 599; *State v. New*

The later decisions upon this subject will, when analyzed, be found to be well bedded in principle. The "town, county, or parish," using Professor Greenleaf's terms, is represented by the town, county or parish officers, but the officers are not the corporation. The municipal corporation consists of the inhabitants and not the officers; the officers are, in truth, nothing more than the agents of the corporation.<sup>1</sup> The inhabitants, therefore, stand to the officers as principals, and if the principals have, by their conduct, accepted the dedication, it is of no great importance that the agents have taken no action in the matter. The inhabitants of a locality having by long continued use treated the way as a public one, they make it such without the intervention of those who derive their authority from them. Creating towns, cities, and other public corporations, is "but the investing the people of the locality with the government thereof," and they may themselves exercise the powers of government of highways quite as effectually by continued use as by any other method. Of course, user can not constitute a way a public one in cases where the incorporating act requires acceptance by some officer or body expressly designated. Where the statute requires that acceptance shall be evidenced in a particular mode no other can be effectual.<sup>2</sup> Where the State, or the local government, makes a plat and thus opens ways to the public, there need be no evidence of acceptance, for that is necessarily involved in the act of dedicating the ways.<sup>3</sup>

The general rule is that an acceptance must be made within

Boston, 11 N. H. 413; *Briel v. Natchez*, 48 Miss. 423; *Eastland v. Fogo*, 27 N. W. Rep. 159; *Town of Lake View v. LeBahn*, 9 N. E. Rep. 269, S. C. 120 Ill. 92; *Stone v. Brooks*, 35 Cal. 489; *Fairfield v. Morey*, 44 Vt. 239; *Kennedy v. LeVan*, 23 Minn. 513; *Manderschid v. Dubuque*, 29 Ia. 73, S. C. 4 Am. Rep. 196; *Curtis v. Hoyt*, 19 Conn. 154; *David v. New Orleans*, 16 La. Ann. 404. So in England, *Rex v. Leake*, 2 Nev. & M. 583; 5 B. & Ad. 469; *Rex v. Lyon*, 5 D. & R. 497. *Contra*. Common-

*wealth v. Kelley*, 8 Gratt. 632, *Manberry v. Inhabs.*, 56 Me. 342; *Bowers v. Suffolk Mfg. Co.*, 4 Cush. 332, 340.

<sup>1</sup> *Citizens' Gas, etc., Co. v. Town of Elwood*, 114 Ind. 332, 337; *City of Valparaiso v. Gardner*, 97 Ind. 1, S. C. 49 Am. Rep. 416.

<sup>2</sup> See *Laughlin v. Washington*, 63 Ia. 652.

<sup>3</sup> *Reilly v. Racine*, 51 Wis. 526. But Compare *People v. Williams*, 64 Cal. 498, *San Francisco v. Calderwood*, 31 Cal. 585, S. C. 91 Am. Dec. 542.

a reasonable time after the dedication, and unless made within a reasonable time the owner may recall the dedication.<sup>1</sup> What is a reasonable time must depend on the circumstances of the particular case, and no general rule can be laid down which will apply in every case.<sup>2</sup> Ordinarily, the question, whether an act has or has not been done within a reasonable time, is a question of fact, and there is no reason why this general principle should not apply to dedications. An acceptance may, however, be concurrent with the dedication, and if it is once made, no matter how soon it follows the act of the owner, it concludes both parties. If the dedication is made and acted upon, then the time intervening is not material, provided the circumstances are such as would make it inequitable for the one party to withdraw the dedication, or the other the acceptance.<sup>3</sup> It is always to be understood that the parties to a dedication may, by mutual agreement, revoke it in cases where the rights of third persons have not intervened.<sup>4</sup> Where, however, third persons have acquired rights which would be impaired by a revocation, then the dedication is deemed irrevocable.<sup>5</sup> It is not merely those who abut upon the particular highway that have a right to resist the revocation of a dedication, but the right may vest in others who own property on connecting highways, and who have acquired rights upon the faith of the dedication. If the acquisition of such rights has been upon the faith of the continuance of the way, and in good faith and without negligence, then the parties to the dedication will be estopped from revoking it.<sup>6</sup>

<sup>1</sup>*Briel v. Natchez*, 48 Miss. 423; 35 Cal. 501; *Watertown v. Cowen*, 4 Hardy v. Memphis, 10 Heisk. 127; *Paige*, 513.

*Crockett v. Boston*, 5 Cush. 182; *Simmons v. Cornell*, 1 R. I. 519; *Cass Co. v. Banks*, 44 Mich. 467. But third persons may acquire such rights on the faith of the dedication as to prevent a revocation.

<sup>2</sup>*Crockett v. Boston*, 5 Cush. 182; *Baker v. Johnston*, 21 Mich. 319.

<sup>3</sup>*Cook v. Harris*, 61 N. Y. 448; *Bartlett v. Bangor*, 67 Me. 460; *Ragan v. McCoy*, 29 Mo. 356; *Stone v. Brooks*, 35 Cal. 501; *Watertown v. Cowen*, 4 Hardy v. Memphis, 10 Heisk. 127; *Paige*, 513.

<sup>4</sup>*Municipality v. Levee Co.*, 7 La. Ann. 270.

<sup>5</sup>*Baker v. Johnson*, 21 Mich. 319; *Com. v. Alburger*, 1 Whart. Pa. 469; *Macon v. Franklin*, 12 Ga. 239; *Haynes v. Thomas*, 7 Ind. 38; *Ragan v. McCoy*, 29 Mo. 356; *State v. Catlin*, 3 Vt. 530.

<sup>6</sup>*Winona v. Huff*, 11 Minn. 119; *Huber v. Gazly*, 18 Ohio, 18; *In re Pearl Street*, 111 Pa. St. 565.

One of the principal things to be established by a party who claims a way by virtue of a dedication is, as we have seen, the intent to dedicate, the *animus dedicandi*. In all cases, as we have more than once said, the intention must be satisfactorily shown. It is not necessary, as is sometimes said, that the evidence upon this point should be conclusive; <sup>1</sup> it is enough if the intention be proved by evidence of a satisfactory character.<sup>2</sup> There is no reason why the evidence in cases of dedication should be required to be more weighty and convincing than in other civil causes where rights of property are in controversy. The intention to dedicate must be clear and unequivocal, and this the evidence must show, but the evidence need not be of a different probative force from that required in other cases involving the title to land. The character of the intention essential to create a dedication is one thing, that of the evidence required to establish it is another. No particular class of evidence is required, for the intention may be established by proving the express contract, or language of the donor, or it may be inferred from his conduct.

Whether the acts relied on as indicating an intention to dedicate were in truth done by the person against whom the dedication is asserted is generally a question of fact for the jury,<sup>3</sup> but the question of the effect of the acts may sometimes be a question of law, and in other instances it may be a question of fact to be inferred from the circumstances developed by the evidence. Generally the case becomes complex and both questions of law and fact enter into it. In the majority of cases the question whether there was an intention to dedicate becomes, like that of negligence, one of mingled law and fact.

<sup>1</sup> *City of Shreveport v. Dronin* (La.), 6 So. R. 656.

<sup>2</sup> *Smith v. State*, 3 Zab. N. J. 712; *Lee v. Lake*, 14 Mich. 12; *City of Demopolis v. Webb* (Ala.), 6 So. R. 408; *McKay v. Village of Hyde Park*, 37 Fed. R. 389; *Mayo v. Murchie*, 3 Munf. (Va.) 358; *Harding v. Jasper*, 14 Cal. 642; *President v. Indianapolis*, etc., 12 Ind. 620; *Evansville v. Evans*, 37 Ind. 229.

<sup>3</sup> *Nixon v. Town of Biloxi* (Miss.), 5 So. R. 621; *Eastland v. Fogo*, 58 Wis. 274; *City of Elgin v. Beckwith* (Ill.), 10 N. E. R. 558. If the question is one of fact it seems quite clear that the essential element, intent, may be inferred. Intent may always be inferred from the evidence, and no greater degree of evidence can be required in one civil case than in another.

There may be cases where the facts are undisputed and where they admit of but one legal interpretation, or can lead to one conclusion only, and in all such cases the question is purely one of law,<sup>1</sup> but in general, the elements of law and fact are intermingled, and in all such cases the court directs the jury as to the law and commits to their decision the question of the existence of the facts alleged to exist as well as the question of the inferences to be drawn from them.<sup>2</sup> Where, however, the question is what intent did in reality exist, and it depends for its solution on the inference of fact to be drawn from the evidence, the jury must be directed to decide it as one of fact. Where the question depends upon the effect of a statutory dedication, or where the intention depends upon the construction to be given the language of a written instrument, the question is for the court as one of law,<sup>3</sup> unless, in the latter case, the instrument is so ambiguous as to make it impossible for the court to construe it without the aid of parol evidence.

There is no reason why the ordinary rules of presumptive evidence should not apply to cases of dedication as well as to other cases where the title to real property is in controversy, and if this be correct it must follow, that the person against whom the dedication is asserted should be held to intend the reasonable and necessary consequences of his act. The presumption that the dedicator intended what his acts indicate is, of course, a rebuttable one, and it is competent to rebut it in all cases except those in which its overthrow would operate as a fraud upon innocent third parties who have parted with value in good faith and without notice on the faith of the conduct which created the presumption.<sup>4</sup> Presumptions have ordinarily the force and effect of a *prima facie* case,<sup>5</sup> and this force should, in consonance with sound principle and closely analogous cases,

<sup>1</sup> *White v. Bradley*, 66 Me. 254; *State v. Schwin* (Wis.), 26 N. W. Rep. 568; *Kennedy v. Mayor*, 65 Md. 514.

<sup>2</sup> *Wood v. Hurd*, 34 N. J. L. 88; *Cowles v. Gray*, 14 Ia. 1; *Daniels v. People*, 21 Ill. 439; *Alford v. Ashley*, 17 Ill. 363; *Harding v. Jasper*, 14 Cal. 642; *Gould v. Glass*, 19 Barb. 195; *Green-*

*leaf Ev.*, section 662; *Angell on Highways*, section 142.

<sup>3</sup> *State v. Schwin* (Wis.), 26 N. W. Rep. 568.

<sup>4</sup> *Campbell v. O'Brien*, 75 Ind. 222; *Faust v. City of Huntington*, 91 Ind. 493, 495.

<sup>5</sup> *Bates v. Prickett*, 5 Ind. 22.

be allotted them in cases of dedication. It will be found on investigation that in all questions connected with highways, courts have from the earliest times acted upon and applied the doctrine of presumptive evidence. One of the presumptions acted upon by the old cases was that all the land between the adjoining owner's enclosure and the middle of the traveled way was given up to the public for passage.<sup>1</sup> Another was that a strip of land lying between the enclosure and the traveled way belonged to the adjoining owner.<sup>2</sup> Still another was, that the owner gave up only a passage way to the public and that he remained the owner of the soil entitled to all profits not inconsistent with the public use.<sup>3</sup> In many cases it is held that evidence of use with the assent of the owner may authorize the presumption that the way was dedicated to the public.<sup>4</sup> The later cases have not hesitated to enforce the doctrine of presumptive evidence. Thus, it is held that where there is a dedication it will be presumed, in the absence of countervailing circumstances, that it was to the public at large, and not to a part only of the community.<sup>5</sup> In the numerous and familiar cases<sup>6</sup> in which a dedication is presumed from the sale of land

<sup>1</sup> Doe v. Pearsey, 7 B. & C. 304; Woolrych on Ways, 5.

<sup>2</sup> Grose v. West, 7 Taunton, 41; Sleet v. Prickett, 2 Starkie, 46; Stevens v. Whistler, 11 East, 51.

<sup>3</sup> Woolrych on Ways, 6.

<sup>4</sup> Lade v. Shepherd, 2 Strange, 909; *Id.* 1004; Jarvis v. Dean, 3 Bing. 447; Rex v. Burr, 4 Campbell, 16; Rex v. Lloyd, 1 Campb. 260; Trustees v. Rugby, 11 East, 375. We are aware that the application of the doctrine made by some of the cases cited has been questioned, but we are now using them for the purpose of tracing back the general principle.

<sup>5</sup> Penny Pot Landing v. City of Philadelphia, 4 Harris, 79.

<sup>6</sup> Story v. N. Y., etc., Co., 90 N. Y. 122; Irwin v. Dixon, 9 How. 10. For other cases illustrating the general principle, see Jersey City v. Canal Co.,

1 Beasley, 547; Hodgson v. Jeffries, 52 Ind. 334; Smith v. City of Navasota (Texas), 10 S. W. R. 414; Forney v. Calhoun County (Ala.), 5 So. R. 750; Harding v. Jasper, 14 Cal. 642; City of Elgin v. Beckwith (Ill.), 10 N. E. R. 558; Eastland v. Fogo, 58 Wis. 274; Harrison County v. Seal (Miss.), 3 Lawyers R. Anno. 659, S. C. 5 So. Rep. 622; *Prima facie*, the person who records a plat, reciting that "it is my addition," is the owner of the land. Branch, etc., R. R. Co. v. Andrews (Kan.), 21 Pac. R. 276. Where a surveyor makes a map of a town site and leaves a space thereon, designated by the word "park," which the owner erases, there is no statutory dedication. White Bear v. Stewart (Minn.), 41 N. W. R. 1045. A still stronger rule as against the public is laid down in Helena v. Abertose, 8 Mont. 499; 20 Pac. 817. But the decision in that case

by reference to a map or plat on which streets and alleys are marked, we find illustrated the application of the general principle of which we are speaking. Presumptive evidence, it is safe to affirm without further illustration, supplies the foundation of the doctrine of implied dedication, and furnishes in such cases the proof of the owner's intentions.

Confusion has resulted from confounding dedications resting upon presumptions with the right given by the statute of limitations. Twenty years use by the public, under claim of right evidenced by the use, will give a right to the road or street, of which the owner of the fee can not divest the public, no matter what may have been his intention. Irrespective of the question of intention, uninterrupted user may give the public an irrevocable right. This result follows, not because an intention to dedicate is conclusively presumed, but because the statute of limitations has divested the owner of a right by destroying all remedy.<sup>1</sup> What the original intention of the owner was ceases to be of importance after the lapse of the limitation prescribed by statute, and the question then is, has there been continuous adverse user for the statutory period? If statutes of limitations are statutes of repose,<sup>2</sup> where mere private interests are involved, much more the reason for holding them to be such in cases where important interests affecting the com-

is of doubtful soundness. In *Eckhart v. Irons* (Ill.), 20 N. E. R. 687, the statement on the plat was this: "Line of front of buildings 20 feet from street," and it was held that there was no dedication of the space between the buildings and the street. Where one not the owner of lands makes a plat on which streets and alleys are laid out, a patent subsequently issued by the United States in trust for the occu, int does not, as it was held in *Diamond Match Co. v. Ontonagon* (Mich.), 40 N. W. R. 448, operate as a dedication of the streets platted. If the plat placed on record is complete in itself, and free from ambiguity, it can not be varied or controlled by parol evidence.

*Brown v. Manning*, 6 Ohio, 298; *Princeton v. Auten*, 77 Ill. 325. But where it is ambiguous, extrinsic evidence may be received. *Darlington v. Com.*, 41 Pa. St. 63. The decision in *Westfall v. Hunt*, 8 Ind. 174, can only be sustained, if, indeed, it can be sustained at all, upon the ground that words "public square" have no settled legal meaning.

<sup>1</sup> *Humbert v. Trinity Church*, 24 Wend. 587.

<sup>2</sup> *Elder v. Bradley*, 2 Sneed, 248. 253; *McElmoyle v. Cohen*, 13 Peters, 312; *Bledsoe v. Little*, 5 Miss. 24; *Sailor v. Hertzogg*, 2 Pa. St. 182; *Kinney v. Vinson*, 32 Texas, 128; *Angell Lim.* (6 ed.), p. 6.



munity at large are directly affected. Public use, for the period of twenty years, makes the public right as unimpeachable as if it had been created by an express grant, and there need not be any evidence whatever of an intention to dedicate.<sup>1</sup>

Time is generally important in cases where the full period of the statutory limitation has not expired, but it is not always of controlling importance. Where the statutory period has not elapsed, evidence that the use has continued for a considerable length of time will not establish a dedication, although it may be a very important item of evidence. If the use has continued for a considerable time with the full assent of the owner, and there are circumstances indicative of an intent to dedicate, the jury will be warranted in sustaining the claim of the public. The greater the length of time the use has continued, the stronger becomes the presumption of dedication.

Some of the English cases have attached too much importance to the element of time which enters so largely into all questions of dedication. In one case an uninterrupted user of eight years was held sufficient without reference to the question of intention, Lord Kenyon saying, "During all that time the public at large were permitted to have the free use of the way, without any impediment whatever, and therefore it is now too late to assert the right, for there is quite a sufficient time for presuming a dedication of the way to the public. In a great case which was much contested, six years was held sufficient."<sup>2</sup> In another case the use was for six years, and it was held that it made at least a *prima facie* case of dedication.<sup>3</sup> In still another case the use was for five years and the court declared that it precluded the owner from reclaiming the land.<sup>4</sup> There are, however, English cases which assert a different doctrine, and refuse to adjudge a dedication unless there has been a user

<sup>1</sup> 3 Kent Com. 451; 2 Dillon Municipal Corporation (3d ed.), section 637; Hall v. Baltimore, etc., 56 Md. 187; Ross v. Thompson, 78 Ind. 90; Bidinger v. Bishop, 76 Ind. 244; Chicago v. Thompson, 9 Ill. App. 524; Smith v. State, 3 Zab. 139; Lemon v. Hayden, 13 Wis.

177.

<sup>2</sup> Rugby Charity v. Merriweather, 11 East, 395; Woolrych Ways, 10.

<sup>3</sup> Regina v. Patrie, 30 Eng. Com. Law and Eq. 207; Inhabitants of East Mark, 11 Q. B. 877.

<sup>4</sup> Jarvis v. Dean, 3 Bingh. 447.

for a very much longer period of time.<sup>1</sup> While it is true that some of the English cases, and perhaps some of the American, have attached undue importance to the element of time, and too little to that of the owner's intention, it is equally true that there are other cases which have refused it that importance which it deserves and have erroneously held that uninterrupted user, no matter what its character, will not sufficiently evidence a dedication unless it has continued for twenty years. The remark of Mr. Woolrych, that, "It is, therefore, rather the intention of the owner than the question of time which must determine the dedication,"<sup>2</sup> is a correct general statement of the law, but like most general statements, it requires some limitation. It is the rule that there must be evidence of intention, but the user itself may be of such a character as to supply a foundation for an inference of the intention to dedicate. Thus, if the use made of the way is such as could only be rightfully made of a public road or street, and is so open and notorious and so unequivocal in character, and so long continued, also, that the discontinuance of the way would seriously injure the public, the intention to dedicate may be presumed against the owner. Judge Dillon says, "No specific length of time is necessary to constitute a valid dedication; all that is required is the assent of the owner of the soil to the public use, and the actual enjoyment by the public for such a length of time that the public accommodation and private rights would be materially affected by a denial or interruption of the enjoyment."<sup>3</sup> This agrees with what is said by Professor Greenleaf, in the extract heretofore quoted,<sup>3</sup> and is a just deduction from the adjudged cases. We find Judge Dillon also saying: "But where the question is as to an intent on the part of the owner to dedicate, user by the public for a period less than that limiting real actions is important as evidence of such intention, and as one of the facts from which it may be inferred."<sup>4</sup> Taking these statements together, a harmonious doctrine results, and one consistent with sound principle; but when the cases

<sup>1</sup> *Woodyer v. Hadden*, 5 Taunton, 126; *Trustees of British Museum v. Finnis*, 5 Carr & Payne, 460.

<sup>2</sup> *Woolrych Ways*, 11.

<sup>3</sup> *Dillon Municipal Corp.*, section 631; *Greenleaf Ev.*, sections 537, 546.

<sup>4</sup> *Dillon Municipal Corp.*, section 638.

are investigated, it will be found that there is much confusion and no little conflict. This result flows from an erroneous application of the rule requiring an intention to dedicate to be shown, and in denying that the character of the user may be such and so long continued as to itself afford sufficient evidence of the intention to dedicate. When once it is fully understood that the character of the user may supply evidence of intent, there is no difficulty in sustaining the doctrine of the eminent writers from whom we have quoted, but if it be denied that user can supply that evidence, then the fact that the rights of the public at large "would be materially affected by a denial or interruption of the enjoyment" can not be justly allowed to exert a controlling influence.

The confusion in the authorities can, in a great measure, be cleared away by holding that the extent and character of the use may furnish evidence of intention to dedicate although it has not continued for the statutory period, and that, when the user has been such as would indicate to prudent men that the public claim is, as of right, to the way as a street or road, and the owner is fully aware of the extent and character of the use and makes no objection, it will be presumed that he intended to throw the way open to the public.<sup>1</sup> This rule does not dispense with the necessity of proving the *animus dedicandi*, but allows it to be inferred from legitimate evidence, and thus secures public and private interests from injury. It is, of course, essential that the use should be with the knowledge of the owner and without interruption from him, and that it should not be under a mere license, but that it should be such a use as in its nature and extent asserts, by necessary implication, a claim of right.<sup>2</sup> If the user falls short of this it can not be considered as supplying evidence sufficient to authorize, as against the owner, the presumption of an intention to dedicate, although

<sup>1</sup> *State v. Trask*, 6 Vt. 355; *Lemon v. Pomfrey v. Village of Saratoga*, 34 Hayden, 13 Wis. \*159; *Green v. Oakes*, 17 Ill. 249; *Askew v. Wynne*, 7 Jones' Law (N. C.), 22; *Larned v. Larned*, 11 Met. (Mass.) 421; *Hobart v. Plymouth*, 100 Mass. 159; *Com. v. Cole*, 26 Pa. St. 187; *Porter v. Attica*, 33 Hun. 605; *Pomfrey v. Village of Saratoga*, 34 Hun. 607; *Carr v. Kolb*, 99 Ind. 53; *Cemetery v. Meninger*, 14 Kan. 312; *Graham v. Hartnett*, 10 Neb. 517; *Harding v. Town of Hale*, 61 Ill. 192.

<sup>2</sup> *Faust v. City of Huntington*, 91 Ind. 493.

it may be material when connected with other evidence upon that question.

No definite length of time is necessary to render a dedication effectual, but, in cases of implied dedications, time is of importance as tending to prove an intention on the part of the owner of the soil to dedicate the way to the public. A dedication may be presumed where the other evidence or circumstances are such as show an intention to dedicate, although a very brief period of time has elapsed since the public use began.<sup>1</sup> Where the intention to dedicate is clearly manifested, the dedication as against the owner becomes effectual as soon as it is accepted by the public, and the question of time is not at all material.<sup>2</sup> Acts indicating a claim to the way by the public added to continuous user for a considerable period of time will be evidence of dedication, as for instance, lighting the way at public expense and in the same manner as other public ways of the vicinity are lighted.<sup>3</sup> Where a change is made in the way, with the assent of the owner of the soil, by abandoning the old traveled track and adopting a different route, the owner will, after the lapse of a period of eight years, be deemed to have dedicated the new way.<sup>4</sup> User for eighteen months accompanied with evidence of the declarations of the owner of an intention to dedicate has also been held sufficient to establish a dedication of the way to the public.<sup>5</sup>

<sup>1</sup> *Hobbs v. Lowell*, 19 Pick. 405; *Estes v. Troy*, 5 Greenl. 368; *Pritchard v. Atkinson*, 4 N. H. 9; *Colden v. Thurbur*, 2 Johns. 424; *Ross v. Thompson*, 78 Ind. 90; *State v. Hill*, 10 Ind. 219; *City of Chicago v. Wright*, 69 Ill. 318; *Town of Princeton v. Templeton*, 71 Ill. 68; *State v. Catlin*, 3 Vt. 530, S. C. 23 Am. Dec. 230; *Cincinnati v. White*, 6 Pet. 431; *Barclay v. Howell*, 6 Peters, 498; *Irwin v. Dixon*, 9 How. 10; *Gamble v. St. Louis*, 12 Mo. 617; *Lewis v. San Antonio*, 7 Texas, 288; *Hoole v. Attorney General*, 22 Ala. 190; *Onstott v. Murray*, 22 Iowa, 457; *Saulett v. New Orleans*, 10 La. Ann. 81; *Mayor v. Franklin*, 12 Ga. 239; *Case v. Favier*,

12 Minn. 89; *Graham v. Hartnett*, 10 Neb. 517; *Greenleaf Ev.*, sections 537, 546; 2 *Dillon Municipal Corp.*, section 638.

<sup>2</sup> *Woodyer v. Hadden*, 5 Taunt. 125; 2 *Smith's Leading Cases*, 176; *Angell on Highways*, section 142; 2 *Dillon's Municipal Corp.*, section 638; *Woolrych on Ways*, 11.

<sup>3</sup> *Rex v. Lloyd*, 1 Campbell, 260.

<sup>4</sup> *Larned v. Larned*, 11 Metcf. 421; *Hobbs v. Lovell*, 19 Pick. 405; *Gowen v. Philadelphia, Exch.*, 5 Watts & Sergt. 141; *Prouty v. Bell*, 44 Vt. 72.

<sup>5</sup> *North American R. R. v. St. Marys*, 1 W. R. 326.

Where a grantee has notice of an attempted dedication by a former owner, and takes no steps to dispute its efficacy, he is estopped to afterwards deny the right of the public to the way.<sup>1</sup> Paving a way in obedience to a notice from the public officers having control of the highways of the locality, is evidence of dedication.<sup>2</sup> It is competent to give in evidence the declarations of a former owner made while he held title, against one asserting a claim against the public.<sup>3</sup> Where a written notice is given by the owner of the fee asserting the way to be a public one, he will be bound by its terms, unless he explains them in such a manner as to destroy their force.<sup>4</sup>

The intention to dedicate is to be gathered from the conduct of the owner of the soil considered in connection with the surrounding circumstances, rather than from what he subsequently testifies his intent was,<sup>5</sup> though there are cases in which it is competent for him to testify as to his original intention.<sup>6</sup> The question is, of course, as to the intention existing at the time the acts relied on as constituting a dedication were done, for the subsequent intention of the owner is not material. Regard is always to be had to the conduct and surrounding circumstances, which are to be taken in connection with the language of the owner, and, in cases of implied dedication, may often control its meaning and effect.<sup>7</sup> In case of an express dedication, the language of the instrument by which it is made controls, and to such cases a different rule applies, and resort is had to the surrounding circumstances only for the purpose of enabling the court to ascertain the meaning and effect of the language employed.

The situation of the land over which the way is claimed gen-

<sup>1</sup> *Neff v. Bates*, 25 Ohio St. 169.

<sup>2</sup> *Bailey v. Culver*, 12 Mo. App. 175.

<sup>3</sup> *People v. Blake*, 60 Cal. 497. Otherwise if made after he had disposed of his title. *Price v. Inhabitants*, 40 N. J. L. 608.

<sup>4</sup> *Turner v. Williams*, 76 Mo. 617.

<sup>5</sup> *City of Columbus v. Dahn*, 36 Ind. 330; *Morgan v. Railroad Co.*, 96 U. S. 716; *Grand Surrey Canal Co. v. Hall*,

1 *Mann. & Gr.* 392; *City of Indianapolis v. Kingsbury*, 101 Ind. 200.

<sup>6</sup> *Bidinger v. Bishop*, 76 Ind. 244; *McKee v. Perchment*, 69 Pa. St. 342.

<sup>7</sup> *Steele v. Sullivan*, 70 Ala. 589; *Hammer v. Belchertown*, 19 Pick. 311; *Smith v. State*, 3 Zab. N. J. 712; *Lee v. Lake*, 14 Mich. 12; *Wright v. Tukey*, 3 Cush. 290; *Gentleman v. Soule*, 32 Ill. 280; *Scott v. State*, 1 Sneed, 633; *Getchell v. Benedict*, 57 Iowa, 121.

erally exerts an important influence upon the question of dedication. "The same acts which would warrant the inference in cities and towns would be insufficient in sparsely settled agricultural districts."<sup>1</sup> Stronger evidence of intention is required in cases where the way claimed is a road in the country than is necessary where the way is within the limits of a town or city, and is claimed to be a street.<sup>2</sup> Where the country through which the road passes is wild, uncultivated prairie land, or where the way has been used only as a mere timber road, or as a road for the accommodation of a neighborhood, strong and convincing evidence is required of an intention to dedicate.<sup>3</sup> This is also true of lands situated in States or territories which are newly settled or sparsely inhabited. It is held that, "the doctrine of dedication inferred from user" is not applicable to the "extensive uncultivated domain of the United States."<sup>4</sup> It is to be observed, of these cases to which we have referred, that they do not decide that the intent to dedicate need be any clearer or more decisive than in other cases, but that more evidence is required to establish the intent. They go to the *quantum* of the evidence, not to the character of the intent. The intent to dedicate must be the same in all cases, but some cases may require more evidence to establish the existence of the intention than others.

Dedication may be established against the owner of the soil by showing that he has platted the ground, representing streets and alleys on the plat, and has sold lots with reference to it,<sup>5</sup> or

<sup>1</sup> Stacy v. Miller, 14 Mo. 478.

<sup>2</sup> Harding v. Jasper, 14 Cal. 649; Jackson v. State, 6 Coldw. (Tenn.) 532.

<sup>3</sup> Hutto v. Tindall, 6 Rich. 396; Ontott v. Murray, 22 Ia. 457; Wyman v. State, 13 Wis. 663; Worth v. Dawson, 1 Sneed, 59; Schwinge v. Dowell, 2 F. & F. 248; Owen v. Crossett, 105 Ill. 354; Ely v. Parsons (Conn.), 10 Atl. Rep. 499. But see Reimer v. Stuber, 20 Pa. St. 458.

<sup>4</sup> Phipps v. State, 7 Blackf. 512; Bigelow v. Hilman, 37 Me. 69; Cyr v. Madore, 73 Me. 53; Burns v. Annas Co., 60 Me. 288.

<sup>5</sup> Irwin v. Dixon, 9 How. 10; Clark v. City of Elizabeth, 40 N. J. L. 172; Lockland v. Smiley, 26 Ohio St. 94; Driedrich v. N. W. R. W. Co., 42 Wis. 248; Shanklin v. Evansville, 55 Ind. 240; Rowan Ex. v. Portland, 8 B. Monroe, 232; Hoadley v. San Francisco, 50 Cal. 265; Hannibal v. Draper, 15 Mo. 634; Harrison v. Augusta Factory, 73 Ga. 447; Gregory v. Lincoln, 13 Neb. 352; Matter of Brooklyn, etc., 73 N. Y. 179; Preston v. Navasota, 34 Tex. 684; Story v. New York, etc., Co., 90 N. Y. 122; Jersey City v. Morris Canal Co., 1 Beasely, 547; Dubuque v. Ma-

by showing that he has adopted a map or plat made by public officers, or other persons,<sup>1</sup> or by showing that he has sold lots describing them as bounded by a street or road.<sup>2</sup> Merely laying out grounds, or merely platting and surveying them, without actually throwing them open to use or actually selling lots with reference to the plat, will not, as a general rule, constitute a dedication.<sup>3</sup>

Where circumstances exist which negative the intent to dedicate no dedication can be presumed. In case of an express dedication the instrument by which it is made affords more than merely presumptive evidence of an intent on the part of the owner of the soil to set apart the land to the public use, and there can, in such cases, be no reason for resorting to extrinsic evidence, except where the instrument is ambiguous and the court is forced to resort to extraneous evidence in order to ascertain and give effect to the intention of the donor. Where, however, conduct and circumstances are relied upon as indicating an intent to dedicate it is competent to prove facts and circumstances tending to break down the presumption.

Any sign placed upon or across the way indicating that the use is merely permissive, with a right in the owner to reassert dominion at his pleasure, will prevent the presumption of dedication, no matter how long the use may continue. Thus, the owner of the soil may effectively defeat a presumption arising from use by the public by placing gates or bars across the way.<sup>4</sup>

loney, 9 Iowa, 450; *Evansville v. Evansville*, 37 Ind. 229; *Baker v. Johnson*, 21 Mich. 319; *Re Pearl Street*, 111 Pa. St. 565.

<sup>1</sup> *Moale v. Baltimore*, 5 Md. 314, *Methodist Church v. Hoboken*, 33 N. J. L. 13; *Matter of Seventeenth Street*, 1 Wend. 262; *Matter of Furman St.*, 17 Wend. 649; *Matter of Twenty Ninth Street*, 1 Hill, 189; *Brooks v. Topeka*, 34 Kan. 277.

<sup>2</sup> *White v. Flannigan*, 1 Md. 525; *People v. Lambier*, 5 Denio, 9; *West Covington v. Freking*, 8 Bush. 128; *Re City of Brooklyn*, 73 N. Y. 179; *Vannatta v. Jones*, 42 N. J. L. 561.

<sup>3</sup> *U. S. v. Chicago*, 7 How. 185; *Carter v. City*, 4 Oregon, 339; *Vannata v. Jones*, 42 N. J. L. 561; *Bailey v. Copeland*, Wright, 150; *Logansport v. Dunn*, 8 Ind. 378.

<sup>4</sup> *Roberts v. Karr*, 1 Campb. 262, *n*; *British Museum v. Finnis*, 5 Campb. 460; *Cook v. Hillsdale*, 7 Mich. 115; *Com. v. Newbury*, 2 Pick. 57; *State v. Greene*, 41 Ia. 693; *Jones v. Davis*, 35 Wis. 376; *State v. Strong*, 25 Me. 297; *Carpenter v. Gwynn*, 35 Barb. 395; *Proctor v. Lewiston*, 25 Ill. 153; *Herhold v. City of Chicago*, 108 Ill. 467, S. C. 6 Am. & Eng. Corp. Cas. 110; *Hall v. Baltimore*, 56 Md. 187.

It is, however, said that placing a gate across the way will not always be conclusive against the public, since it may be that the public may have acquired an easement subject to the right of the owner to maintain a gate for his own convenience as for the purpose of preventing cattle from straying.<sup>1</sup> An alley kept in repair by the owner, and at times fenced across by the owner, although used by the public for many years, was held not to be a public way.<sup>2</sup> Where the situation of land is such as to indicate that it does not form part of the way, although it may be alongside of the way and be used by the public, no dedication can be presumed without strong evidence of an intent on the part of the owner to devote the land to the use of the public.<sup>3</sup> If the owner of the soil makes all repairs, it will be a circumstance strongly tending to rebut the presumption of an intent to dedicate.<sup>4</sup> Payment of taxes assessed by the local authorities is evidence tending to defeat the presumption of dedication, but the mere payment of taxes will not rebut a presumption arising from conduct and circumstances, where they are such as to clearly indicate an intent to dedicate.<sup>5</sup> Where the owner makes use of the land for his own private purposes and the character of the use is inconsistent with the right of the public to the way as a street or road, the presumption of dedication will be rebutted, although the public may have used the way for travel for many years.<sup>6</sup> And there are many other cases in which the acts of the owner, or of the public authorities have

<sup>1</sup> *Davis v. Stephens*, 7 Carr & P. 570. See, also, *City of Indianapolis v. Kingsbury*, 101 Ind. 200, where it is held that swinging a gate across the way after private rights have been acquired will not defeat the dedication.

<sup>2</sup> *Brinck v. Collier*, 56 Mo. 160; *White v. Bradley*, 66 Me. 254.

<sup>3</sup> *Gowen v. Philadelphia, etc., Co.*, 5 Watts & Serg. 141, S. C. 40 Am Dec. 489, *Tallmadge v. East River Bank*, 26 N. Y. 108; *Attorney General v. Whitney*, 137 Mass. 450.

<sup>4</sup> *Brinck v. Collier*, 56 Mo. 160; *Irwin v. Dixon*, 9 How. 10.

<sup>5</sup> *Getchel v. Benedict*, 57 Iowa, 121; *Lemon v. Hayden*, 13 Wis. 159; *Wyman v. State*, 13 Wis. 663. Nor will assessment of taxes estop the public from claiming dedication. *Ellsworth v. Grand Rapids*, 27 Mich. 250.

<sup>6</sup> *Irwin v. Dixon*, 9 How. 10; *McCormick v. Baltimore*, 45 Md. 512; *Stone v. Jackson*, 32 L. & E. 349; *Bowers v. Suffolk Co.*, 4 Cush. 332; *Bowman v. Wickliffe*, 15 B. Monroe, 84; *Green v. Bethea*, 30 Ga. 897.



been held sufficient to rebut the presumption of dedication which might otherwise have arisen because of the public use.<sup>1</sup>

Where the conduct of the owner is such as to clearly indicate an intention to dedicate, and the public, or private persons, have acted upon his conduct, and have acquired valuable rights which would be lost by an interruption of the enjoyment of the way, he can not by subsequent acts or declarations impair the rights of the public, nor take away those of the persons who have relied on his conduct. The conduct and declarations which are admissible to rebut a presumption are such as preceded the acquisition of rights in the way as a public road or street.<sup>2</sup> The statements of the owner of the soil at the time the act is done, which is asserted to constitute a dedication, are competent in his favor. It has been held that a party may testify as to what his intent was at the time the act relied on as constituting a dedication was performed.<sup>3</sup> Even if it be competent for a party to subsequently testify as to what his intent was when he did the act, it is clear that the question is as to his intent at the time the act was done, and it is immaterial what it was at a subsequent time.<sup>4</sup> Nor will testimony as to the secret intent be allowed to overcome presumptions clearly arising on the facts and circumstances of the transaction.<sup>5</sup>

<sup>1</sup> *City of Chicago v. Stinson* (Ill.), 17 N. E. Rep. 43; *City of Chicago v. Hill* (Ill.), 17 N. E. Rep. 46; *Princeton v. Templeton*, 71 Ill. 71; *Mayor v. Glenn*, 67 Md. 390, S. C. 10 Atl. Rep. 70; *Smith v. Inge*, 80 Ala. 283; *South Branch R. R. Co. v. Parker* (N. J.), 4 Cent. Rep. 63.

<sup>2</sup> *Downer v. The St. Paul, etc., Co.*, 23 Minn. 271; *The Grand Surrey Canal Co. v. Hall*, 1 Mann. & Gr. 392. Declarations have been held admissible as part of the *res gestæ*, even though made after the public had begun to use

the way. *Buchanan v. Curtis*, 25 Wis. 99. Possession by the donor after an express dedication does not necessarily impair the rights of the public. *In re Comm'rs of Public Parks*, 6 N. Y. Supp. Rep. 779.

<sup>3</sup> *Bidinger v. Bishop*, 76 Ind. 244.

<sup>4</sup> *Morgan v. R. R. Co.*, 96 U. S. 716; *Ruch v. City of Rock Island*, 5 Biss. 95.

<sup>5</sup> *Denver v. Clements*, 3 Col. 484; *Littledale J.*, in *Barraclough v. Johnson*, 8 Ad. & E. 105; *Addison on Torts*, section 302.

## CHAPTER VI.

### PRESCRIPTION.

Roads and streets may be established by prescription as well as by dedication and legislative authority.

Prescription, as the term is ordinarily employed, presupposes a grant from the rightful owner, and it is said by some of the authorities, that the doctrine of prescription has no application to highways, for the reason that the public can not take by grant.<sup>1</sup> This leads to the conclusion that user is simply an evidence of dedication, and to that conclusion we can not assent. It may possibly be true that the doctrine of prescription, in its strict and rigorous force, does not fully apply to roads and streets, but it is also true that highways may be created in a manner so nearly resembling the ordinary case of a title by prescription, that it is safe to affirm that highways do exist by prescription. The supposition of the existence of a precedent grant is a pure and useless fiction, and is not needed in any case to support the right conferred by adverse possession and user.<sup>2</sup> The existence of such a fiction should not be allowed to prevent a just decision upon matters concerning public and private rights, nor should it deter courts from applying a sound and reasonable rule to cases fully within the reason upon which the rule rests. It is narrowing the operation of a just rule, much needed for the security of public rights and the repose of society, far too much to hold that in all cases prescriptive use is mere evidence of dedication. User of a way under claim of right

<sup>1</sup> Angell on Highways, section 131. But the correctness of this statement may be doubted, since, while it is true that the public, as a general undesignated community, may not, in strictness, take by grant, still, local officers and bodies may take for it as trustees.

Where a highway comes into existence, no matter how, it passes at once under control of such of the public representatives as the law designates.

<sup>2</sup> Krier's Private Road, 73 Pa. St. 109; "Highways by Limitation," 7 Cent. L.

J. 123.

for twenty years will unquestionably confer an easement upon the public, whether there is or is not any direct or affirmative act from which an intent to set apart the way to the public can be inferred, while no dedication not resting wholly or in part on lapse of time can be established without some fact indicating an intention on the part of the owner to set apart the way to the public.

Where the use of the way has continued for the period prescribed by statute, or for the period designated by the common law authorities as from a time immemorial, there exists a right by prescription, founded, as Chief Justice Shaw says, upon the presumption that the way was "at some anterior period laid out and established by competent authority."<sup>1</sup> If it be granted that there is no such thing as a public way by prescription, then we shall have embarrassing questions, such as whether in a case where the person owning the fee is under legal disability there can be a highway, for, in such a case, the general rule, if applied, would declare the owner not capable of divesting himself of title, and, therefore, that no rights were ever acquired by the public by dedication. If it be held, as upon principle and authority it may well be, that after the lapse of the statutory period the law will presume that the road or street was laid out and opened by competent authority, no such embarrassments can arise. In many instances it would be impossible to apply the doctrine of dedication without stripping it of its chief and distinguishing feature, the intent to set apart to public use, and yet the case might be one where it would be unjust to individual citizens and prejudicial to public rights to allow an owner to reclaim the land and destroy the highway; but, by applying the doctrine of prescription, and presuming the due creation of the

<sup>1</sup> *Reed v. Northfield*, 13 Pick. 94. To the same effect, *Odiorne v. Wade*, 5 Pick. 421; *Onstott v. Murray*, 22 Iowa, 457; *State v. Green*, 41 Iowa, 693; *Commonwealth v. Cole*, 26 Pa. St. 187; *Brownell v. Palmer*, 22 Conn. 107; *Detroit v. Railroad Co.*, 23 Mich. 173; *Devenpeck v. Lambert*, 44 Barb. 596; *Summers v. State*, 51 Ind. 201; *Jennings v. Tisbury*, 5 Gray, 73; *State v. Wells*, 70 Mo. 635; *Fitchburg R. R. Co. v. Page*, 131 Mass. 391; *State v. Mitchell*, 58 Iowa, 567. If there can be no way by prescription, then user for any length of time, even for an hundred years or more, would be of no avail. It is, of course, implied that the user shall be under claim that the public have a right to the way as one of the highways of the locality.

highway by the anterior exercise of rightful authority, all inconsistency is avoided and just results are reached. There are authorities sustaining the view here advocated,<sup>1</sup> and it certainly rests on solid principle, for the presumption that the road or street was established by lawful authority is a natural and reasonable one. Dedication implies a conveyance and an acceptance, while prescription requires an unbroken possession and user under a claim of right. The basis of the claim is not, however, a grant, but a record, presumed to have been made according to law.

In many cases public corporations, such as counties, cities, and towns, are empowered to take and hold real estate, and where this general power is conferred, there can be no reason for denying the applicability of the doctrine of prescription on the ground that there is no power to accept a grant, so that there is no great difficulty in resting the doctrine that there may be highways by prescription upon the presumption of an antecedent grant. It is not, indeed, easy to perceive any reason why an incorporated town or city, or a county or township, may not receive the grant of an easement for public streets and roads. They would, no doubt, take it in trust for the public, but they would, nevertheless, be grantees possessing capacity to take, and if they are capable of taking by express grant, then, surely, the same capacity must extend to implied ones, or such as are created by operation of law and not by contract.

It may not, in the great majority of cases, be material whether the road or street is created by dedication or exists by prescription, but, as we shall hereafter see, there are cases where it would be very difficult to hold that there was a dedication without great confusion and no little inconsistency, and yet where

<sup>1</sup>*Blanchard v. Moulton*, 63 Me. 434; *Bunker*, 59 Me. 366, 370; *Wallace v. Gould v. Boston*, 120 Mass. 300; *Garret v. Jackson*, 20 Pa. St. 331; *State v. O'Laughlin*, 29 Kan. 20; *Commissioners v. Coupe*, 128 Mass. 63, 65; *Ely v. Parsons*, 55 Conn. 83, S. C. 10 Atl. Rep. 499; *Stevens v. Nashua*, 46 N. H. 192; *State v. Tucker*, 36 Iowa, 485; *State v. Walters*, 69 Mo. 463; *State v. Fletcher*, 30 N. H. 434; *Campton's Petition*, 41 N. H. 197; *Hicks v. Fish*, 4 Mason (C. C.), 310; *State v. Hunter*, 5 Ired. 369; *City of Wilkes Barre's Appeal*, 100 Pa. St. 313, and authorities in last note, *supra*. *Wakeman v. Wilbur*, 4 N. Y. S. R. 938.

it could be held without the slightest inconsistency, and with an entire absence of conflict of doctrine that there was a highway by prescription. Prescription refers the right to the highway to the presumption that it was originally established pursuant to law by the proper authority, while dedication refers it to a contract either express or implied.

Where there has been an attempt to establish a highway, but because of some defect the proceedings are not valid, the owner's rights would not be impaired, nor would any highway be created in case there had been no user of the way by the public, and no element of estoppel. If, however, the public acting on the claim supplied by such proceedings had used the way for the requisite period then there would, no doubt, be a public way. This would be so, even though the owner at the outset had opposed the establishment of the highway. In such a case the right to the highway would be clearly referable to the claim or color of right furnished by the defective proceedings instituted for the laying out and opening of the road. If the right to the way depends solely upon user, then the width of the way and the extent of the servitude is measured by the character of the user, for the easement can not be broader than the user;<sup>1</sup> but if there were defective proceedings, and the use was under color of the claim supplied by them, then the extent of the easement is to be measured by the claim exhibited by the proceedings and by them intended to be established.<sup>2</sup> This is in strict accordance with the elementary principle of the law of real property, which declares that, where there is color of title and possession of part is taken under the claim of title, it will cover the whole, but that where there is no color of title the right will not extend beyond the actual possession, the *pedis possessio*.<sup>3</sup>

<sup>1</sup> Harlow v. Humiston, 6 Cow. 189; Waltman v. Rund, 109 Ind. 366; Commonwealth v. Old Colony R. R., 14 Gray, 93.

Davis v. Clinton, 58 Ia. 399; Trask v. State, 6 Vt. 355, S. C. 27 Am. Dec. 554; Hinks v. Hinks, 46 Me. 423; Epler v. Niman, 5 Ind. 459; Hart v. Trustees, 15 Ind. 226; Holbrook v. McBride, 4 Gray, 215; Kirk v. Smith, 9 Wheat. 288. But see State v. Morse, 50 N. H. 9; Bumpus v. Miller, 4 Mich. 159.

<sup>2</sup> Manrose v. Parker, 90 Ill. 581. See, also, 7 Cent. L. J. 125. Compare

<sup>3</sup> See Forest v. Jackson, 56 N. H. 357; Humbert v. Trinity Church, 24 Wend. 604; Sedgw. & Wait on Tr. of Tit. to Land, section 761. Evidence of wheel tracks is admissible to show the limits of the use. Plummer v. Ossifee, 59 N. H. 55.

As a general rule, "before a highway can be established by prescription, it must appear that the general public, under a claim of right, and not by mere permission of the owner, used some defined way without interruption or substantial change, for a period of twenty years or more."<sup>1</sup> We have already shown that the use must be under claim of right. Where the use is merely permissive and not adverse, there is no basis on which a right of way by prescription can rest.<sup>2</sup> For this reason some of the courts have held that the use of vacant, uninclosed land for twenty years by the public in passing and repassing will give them no prescriptive rights.<sup>3</sup> The use must not only be adverse, but must also be continuous and uninterrupted,<sup>4</sup> although it is not every slight or occasional use of the land by the owner that will constitute an interruption of the public use.<sup>5</sup> If the adverse use or occupancy by the public is once interrupted or broken, prescription must begin anew.<sup>6</sup>

The public can not acquire a prescriptive right to pass over land generally, and where a highway is claimed by prescrip-

<sup>1</sup> *Shellhouse v. State*, 110 Ind. 509; *State v. Green*, 41 Ia. 693; *Chestnut Hill, etc., T. P. Co. v. Piper*, 77 Pa. St. 432; *Pentland v. Keep*, 41 Wis. 490; *Johnson v. Lewis*, 47 Ark. 66.

<sup>2</sup> *Pentland v. Keep*, 41 Wis. 490; *Jones v. Davis*, 35 Wis. 376; *Green v. Bethea*, 30 Ga. 896; *Blanchard v. Moulton*, 63 Me. 434; *Lanier v. Booth*, 50 Miss. 410; *Talbott v. Grace*, 30 Ind. 389; *Tucker v. Conrad*, 103 Ind. 349; *People v. Livingston*, 27 Hun. 105; *Stewart v. Frink*, 94 N. C. 487, S. C. 55 Am. Rep. 618.

<sup>3</sup> *Fox v. Virgin*, 11 Ill. App. 513. See, also, *State v. Horn*, 35 Kan. 717; *Rathman v. Norenberg*, 21 Neb. 467; *Cyr v. Dufour*, 68 Me. 492; *Shellhouse v. State*, 110 Ind. 509, 511; *Hutto v. Tindal*, 6 Rich. 396; *Herhold v. Chicago*, 108 Ill. 467. So held where the owner was a non-resident without notice that the road was claimed as a highway. *State v. Mitchell*, 58 Ia. 567;

*South Branch R. R. Co. v. Parker*, 41 N. J. Eq. 489, S. C. 4 Cent. Rep. 63.

<sup>4</sup> *Bodfish v. Bodfish*, 105 Mass. 317; *Jones v. Davis*, 35 Wis. 376; *State v. Green*, 41 Ia. 673; *Watt v. Trapp*, 2 Rich. 136; *Gould on Waters*, section 334; *Kennedy v. Mayor*, 65 Md. 514, S. C. 9 Atl. Rep. 234.

<sup>5</sup> *Toof v. Decatur*, 19 Ill. App. 204. Encroachments upon a road, or changes in the line of travel at distant points, do not prevent it from becoming a public highway by prescription where the user remains uninterrupted and unchanged. *Hart v. Red Cedar*, 63 Wis. 634. See, also, *Kelsey v. Furman*, 36 Ia. 614. If the use by the owner of the fee is consistent with the claim asserted by the public it will not impair the public right.

<sup>6</sup> *Shellhouse v. State*, 110 Ind. 509; *State v. Bishop*, 22 Mo. App. 435, S. C. 4 West Rep. 793; *Webster v. Lowell*, 142 Mass. 325.

tion, a certain and well defined line of travel must be shown ;<sup>1</sup> but a slight deviation on account of some obstacle will not affect the right.<sup>2</sup>

Some confusion in the authorities upon the question of the establishment of highways by prescription is caused by the existence in many of the States of statutes altering the rules otherwise applicable, and, in some instances, reducing the period of user required on the part of the public.<sup>3</sup> Thus, for example, a statute of Indiana provides that "all public highways which have been or may hereafter be used as such for twenty years or more shall be deemed public highways."<sup>4</sup> Twenty years use of a road is held to constitute it a highway under this statute, whether the use be over the objection of the adjoining land owners or with their consent.<sup>5</sup> It seems, however, that the statute does not apply to the streets of a town or city.<sup>6</sup>

The existence of a highway by prescription is generally proved by the parol evidence of witnesses that the road in question has been known and used as a highway or road common to all the people for the necessary period of prescription.<sup>7</sup>

In accordance with the rule that prescription presupposes a grant, it has been held that the public can not acquire the right to a highway by prescription as against married women,<sup>8</sup> minors,<sup>9</sup> or insane persons<sup>10</sup> incapable of making a grant. But, if we are correct in our theory that highways may be established by ad-

<sup>1</sup> *South Branch R. R. Co. v. Parker*, 41 N. J. Eq. 489; *Bryan v. East St. Louis*, 12 Ill. App. 390; *Owens v. Crosselt*, 105 Ill. 354.

<sup>2</sup> *Howard v. State*, 47 Ark. 431; *Gentleman v. Soule*, 32 Ill. 271, S. C. 83 Am. Dec. 264. But where the deviation is purposely made and continued for the requisite time the new road may become a highway by prescription. *Kelsey v. Furman*, 36 Ia. 614; *State v. McGee*, 40 Ia. 595.

<sup>3</sup> See *State v. Wells*, 70 Mo. 635; *Zimmerman v. Snowden* (Mo.), 4 West. Rep. 406; *Haars v. Choussard*, 17 Tex. 588; *Bolger v. Foss*, 65 Cal. 250.

<sup>4</sup> Rev. St. Ind. 1881, section 5035.

<sup>5</sup> *Strong v. Makeever*, 102 Ind. 578. See, also, *Willey v. Norfolk S. R. Co.*, 96 N. C. 408.

<sup>6</sup> *Tucker v. Conrad*, 103 Ind. 349.

<sup>7</sup> *Commonwealth v. Coupe*, 128 Mass. 63; *Woburn v. Henshaw*, 101 Mass. 193; *Mosier v. Vincent*, 34 Iowa, 478; *Eyman v. People*, 1 Gilm. (Ill.) 4, 8; *Hampson v. Taylor* (R. I.), 8 Atl. Rep. 331.

<sup>8</sup> *State v. Bishop*, 22 Mo. App. 435. See, also, *McGregor v. Wait*, 10 Gray, 74; *Schenley v. Com.*, 36 Pa. St. 29.

<sup>9</sup> *Watkins v. Peck*, 13 N. H. 360; *Melvin v. Whiting*, 13 Pick. 184.

<sup>10</sup> *Edson v. Munsell*, 10 Allen, 557.

verse user without relying upon the presumption of a grant, the doctrine of these cases is questionable, and in the case of married women that doctrine would, in the future, have no application in many of the states, for the reason that their disabilities are now abolished by statute. Then, too, the modern statutes, providing that user for a certain period may establish a road as a public highway, make no exceptions in favor of any class. In any event, an intervening disability not existing at the beginning of the period of prescription will not defeat the prescriptive right.<sup>1</sup>

If there can be no highway by prescription and there has been long continued user, the persons using the way must be treated as trespassers, unless it appears that they were mere licensees, but wrong is not to be imputed to citizens nor is it to be inferred without evidence that they are mere licensees, so that the natural presumption is that the persons who have traveled along a way, which in appearance is a road or street, have done so because it was their right. If there is no dedication, then the right must be referred to prescription, unless the way was regularly established under legislative authority. The theory, as we have said, upon which rests their prescriptive right, is that there were at some antecedent time proceedings establishing the way, and that to these proceedings lapse of time has imparted validity.<sup>2</sup> If this be the true theory, then it must follow that prescription may be valid as against persons under legal disability, for, if lapse of time secures repose and

<sup>1</sup> *Wallace v. Fletcher*, 30 N. H. 434; *Tracy v. Atherton*, 36 Vt. 503; *Peck v. Randall*, 1 Johns. 176; *Edson v. Munsell*, 10 Allen, 557, 566; *Reimer v. Stuber*, 20 Pa. St. 458, 463.

<sup>2</sup> There is no valid reason why such a presumption should not be made and it is consistent with all the analogies of the law. It is unduly restricting the doctrine of prescription to limit it strictly to grants. In *Wallace v. Fletcher*, 30 N. H. 434, the court said: "We have already stated our impression that by the law as generally recognized in this country, the party claim-

ing the title under such possession is not obliged to rely merely on a presumption of a grant, but he may rest on a presumption of right, or of any grant, reservation or record which may be necessary to establish his title. And it seems to us this may properly be regarded as a species of prescription established here by a course of judicial decisions by analogy to the statute of limitations in real actions." In a subsequent case this doctrine was approved, and it was said: "This rule relates to all incorporeal hereditaments." *Webber v. Chapman*, 42 N. H. 326.



establishes the way, it must do so against all classes. The presumption must be a complete one, and to be complete it must assume that the proceedings were such as were valid against all persons whatsoever, and that whatever was necessary to make them fully effective was done, and so done as to bind all who had an interest in the land over which the way exists.

It is ordinarily of little practical importance whether the right of the public be referred to a dedication or to prescription, but there are cases in which it may be of high importance to refer it to prescription, as in the case of persons under disability and cases where the owner of the fee is unknown or a resident of a foreign country. If the right depends entirely upon contract as dedication does, then, in many instances, it would be impossible to infer a contract no matter how long and how complete the user may be, but if the right rests upon the presumption that the land was at some antecedent time duly acquired under the right of eminent domain, the rights of the public may be protected. It is much more reasonable, it seems to us, where there has been a long continued free and full use of a way, to presume that the public acquired the right to travel the way because it was laid out according to law than it is to infer that the persons who freely used the way were trespassers or licensees. Possession is some evidence of ownership, and where there is long and uninterrupted use of a way the natural and reasonable presumption is that it is owned by the public, for continued use of a highway is possession, not, indeed, of the fee, but of the easement.<sup>1</sup>

<sup>1</sup> *Barker v. Clark*, 4 N. H. 380, S. C. 17 Am. Dec. 428; *Stanton v. Rivers*, 4 McCord, 445, S. C. 13 Am. Dec. 741; *Jones v. Percival*, 5 Am. Dec. 741; *Rosser v. Bunn*, 66 Ala. Pick. 485, S. C. 16 Am. Dec. 415; *Lan- 89*.

## CHAPTER VII.

### APPROPRIATION OF PROPERTY FOR ROADS AND STREETS.

The legislature may cause public roads and streets to be laid out, opened, or widened, whenever in its judgment the public welfare or convenience demands, and this it may do against the will of the land owners. The right to seize private property for public roads and streets is an inherent attribute of sovereignty. It is not conferred by constitutions, but is limited and regulated by them.<sup>1</sup> Every citizen acquires and holds his property subject to this paramount dominion of the sovereign. By the grant of general legislative power to the legislative assemblies, this element of sovereignty is vested in the legislative department of the government. A statute enacted in the exercise of this power and in accordance with the constitution has the effect "to oblige the owner to alienate his possessions for a reasonable price."

While the power is primarily and essentially legislative, it can not be practically executed without the intervention or assistance of the judiciary, nor can the legislature conclusively determine that all the conditions exist which justify it in exercising this high power. Matters of expedience and policy are exclusively

<sup>1</sup> *West River Bridge Co. v. Dix*, 6 How. 507; *Charles River Bridge v. Warren Bridge*, 11 Pet. (U. S.) 420; *Von Brocklin v. Tennessee*, 117 U. S. 151; *U. S. v. Great Falls M. Co.*, 112 U. S. 645; *U. S. v. Jones*, 109 U. S. 513; *Kohl v. U. S.*, 91 U. S. 371; *Fort Leavenworth R. R. Co.*, 114 U. S. 531; *Smith v. City*, 92 N. Y. 463; *Holt v. Council of Somerville*, 127 Mass. 410; *Mississippi, etc., Co. v. Patterson*, 98 U. S. 406. Distinction between power of eminent domain and police power is shown in *Bass v. State*, 34 La. Ann. 494; *Davenport v. City of Richmond*, 81 Va. 639; *Hollingsworth v. Parish of Tenas*, 17 Fed. R. 114; *Philadelphia v. Scott*, 81 Pa. St. 85. It is said that independent of constitutional limitations the power is subject to restriction. *Haims v. Chesapeake, etc., Co.*, 1 Md. Ch. 248; *Parham v. Justices*, 9 Ga. 341; *Matter of Highway*, 22 N. J. Law, 293.

matters for legislative judgment, but there are other matters upon which the final decision must be made by the courts.<sup>1</sup>

The power from which is derived the authority to seize and appropriate the property of the citizen is generally called the right of eminent domain. This right is thus defined by Judge Cooley: "More accurately, it is the rightful authority which exists in every sovereignty, to control and regulate those rights of a public nature which pertain to its citizens in common, and to appropriate and control individual property for the public benefit, as the public safety, necessity, convenience or welfare may demand."<sup>2</sup> The right is founded in necessity, and is guarded and restricted, but not created, by constitutional provisions.<sup>3</sup> At common law the right was rested upon the maxim *Salus populi suprema lex*, and under the theory of the British government, there was originally no restraint upon its exercise, although it is said that precedent has established a restraint which the Parliament never feels at liberty to disregard.

Before the adoption of the fourteenth amendment to the Federal constitution, it was regarded as settled that the only limitation upon the power of a State to exercise the right of eminent domain was that contained in its own constitution,<sup>4</sup> but that amendment has worked a radical change.<sup>5</sup> The extent of the change thus produced can not, as the authorities now stand, be certainly measured, but it may safely be affirmed that the question of "due process of law" is now a Federal question. We think that it may be further said that the decided cases require compensation, notice and procedure conformable to law, in order to constitute due process of law within the meaning of the Federal constitution. This leaves much to the States, for, subject to the limitations flowing from the requirement that there shall

<sup>1</sup> *State v. Fuller*, 5 Vroom, 227, *Tide-water v. Coster*, 3 C. E. Green, 518; *Matter of Deansville Cemetery*, 66 N. Y. 569; *Tyler v. Beecher*, 44 Vt. 648, *McQuillen v. Hatton*, 42 Ohio St. 202.

<sup>2</sup> *Cooley Const. Lim.* (5th ed.), 649.

<sup>3</sup> *Bloodgood v. Mohawk, etc.*, R. R. Co., 18 Wend. 9, S. C. 31 Am. Dec. 313, *Todd v. Austin*, 34 Conn. 78; *Hey-*

*ward v. Mayor*, 7 N. Y. 314; *Mills Em. Dom.*, section 1.

<sup>4</sup> *Barron v. Baltimore*, 7 Peters, 243; *Withers v. Buckley*, 20 How. 84.

<sup>5</sup> *Scott v. City of Toledo*, 36 Fed. R. 385; *Davidson v. New Orleans*, 96 U. S. 107; *Kentucky R. R. Tax Cases*, 115 U. S. 331.

be due process of law, they still retain the right and power to prescribe the mode of procedure, but just how far their power extends in this direction we do not venture to declare.

Within its sphere, the Federal government is sovereign, and, like all sovereigns, must possess the power of eminent domain. If its power be sovereign, it is supreme, and if supreme, it is exclusive, for no other sovereign can share its prerogatives. It may condemn land situated within a State, when required for national public use, and need not invoke or request the assistance of the State.<sup>1</sup> In the earlier cases this was considered a doubtful question, but we can see no reason for the doubt, and it is now set at rest by the later cases.<sup>2</sup> The denial of this power to the Federal government would be, in effect, a denial of its sovereignty within its own territory. Of course, the national authorities can exercise the power only when the necessities of the nation require; in all other cases the power belongs exclusively to the States respectively, and can only be exercised by them within their respective territories. The general government has no authority over the exercise of the right by the States within their respective jurisdictions, beyond that given by the Fourteenth amendment, for within them they are sovereigns,<sup>3</sup> subject only to the provisions of the Federal constitution.

Where there is "due process of law," no provision of the United States constitution is violated in its exercise by the States, for no provision of that instrument attempts to limit them, except to the extent and in the respect indicated. There is no

<sup>1</sup> *Kohl v. U. S.*, 91 U. S. 367; *Darlington v. U. S.*, 82 Pa. St. 382; *Trombly v. Auditor*, 23 Mich. 471; *State, ex rel., v. Indiana, etc., Co. (Ind.)*, 22 N. E. R. 778.

<sup>2</sup> *Pollard's Lessees v. Hagan*, 3 How. 212; *Chesapeake, etc., Co. v. Union Bank*, 4 Cr. C. Ct. 75.

<sup>3</sup> *Concord R. R. Co. v. Greely*, 17 N. H. 47; *Martin v. Dix*, 52 Miss. 53; *Cairo, etc., Co. v. Turner*, 31 Ark. 494; *Webber v. Harbor Com.*, 18 Wall. 57; *Swan v. Williams*, 2 Mich. 427; *War-*

*ren v. St. Paul, etc., Co.*, 18 Minn. 384. Speaking of the right of eminent domain, one of the courts said: "It is a necessary attribute of sovereignty in the State rather than any reserved right in the grant of property to the citizen." *Noll v. Dubuque, etc., Co.*, 32 Iowa, 66. See, also, *Sholl v. German Coal Co.*, 118 Ill. 427; *White v. Nashville, etc., Co.*, 7 Heisk. 518; *Roanoke City v. Berkowitz*, 80 Va. 616; *American Print Works v. Lawrence*, 23 N. J. Law, 615.

impairment of the obligations of contracts, as all persons acquired their property subject to this great right, which is inherent in all sovereign powers.<sup>1</sup> Where, however, proceedings are instituted for the condemnation of land and exceptions are filed, or other steps taken to make the case one of adversary proceedings, then the cause may be removed from the State to the Federal courts under the act of Congress providing for the removal of causes from the State to the Federal courts for trial. This, we suppose, could only be done when the proceedings have so far progressed as to assume the form of an ordinary action, and the removal could not take place until the initiatory steps had been taken and an appraisalment<sup>2</sup> secured, since to hold otherwise would be to substitute the machinery of the Federal government for that of the State, and this would be a violation of settled principles. The seizure of lands for local public purposes is a matter exclusively within the jurisdiction of the State authorities, and, although the Federal courts may acquire jurisdiction, after the proceedings have assumed the form of an action at law, under the act providing for the removal of causes from the State courts, the statutes and the law of the State would supply the rules by which the rights of the parties would be adjusted and determined. It is the general rule that the Federal tribunals will adopt and follow the law of the State where the controversy arises in matters of local concern,<sup>3</sup> and there can not be a case where there is more reason for the application of this general rule than there is in cases of the class under consideration, for, if the rule be departed from in

<sup>1</sup> *West River Bridge Co. v. Dix*, 6 How. 507; *Railroad Co. v. Railroad*, 13 How. 71; *Withers v. Buckley*, 20 How. 84; *Pumpelly v. Green Bay*, 13 Wall. 166; *Toll Bridge Co. v. Railroad Co.*, 17 Conn. 40; *Bridge Co. v. Lowell*, 4 Gray, 474; *Livingston v. Mayor*, 8 Wend. 85; *Rinthrop v. Bourg*, 4 Martin (La.), 97; *Barron v. Mayor, etc.*, 7 Pet. (U. S.) 243; *Young v. McKenzie*, 3 Ga. 31; *Cairo, etc., Co. v. Turner*, 31 Ark. 494; *Raleigh, etc., Co. v. Davis*, 2 Dev. & B. Law, 451; *Martin v. Dix*, 52 Miss. 53; *Johnson v. Rankin*, 70 N. C. 550; *Concord R. R. Co. v. Greely*, 17 N. H. 47.

<sup>2</sup> *Boom Co. v. Patterson*, 98 U. S. 403.

<sup>3</sup> *Secombe v. Railroad Co.*, 23 Wall. 108; *Walker v. State Harbor Comm'rs*, 17 Wall. 648, *Burgess v. Seligman*, 107 U. S. 20. But since the adoption of the Fourteenth amendment the question as to whether there is "due process of law," is probably a Federal question. *Scott v. City of Toledo*, 36 Fed. Rep. 385.

such cases, conflict and confusion will ensue, leading to deplorable results.<sup>1</sup>

The sovereign right of eminent domain is founded upon necessity. Where there is no necessity for taking private property for public use, the power can not be successfully invoked.<sup>2</sup> It is not, however, essential that the necessity should be absolute, for it is sufficient if the purpose for which the property is needed be one required for the public welfare and convenience.<sup>3</sup> Where the legislature directly declares that land shall be taken for a specified purpose and the purpose is a public one, then this legislative declaration determines the necessity for the taking, and no further inquiry is to be made as to the existence of the public necessity.<sup>4</sup> Where, however, as is frequently the case, the legislature provides that the question shall be tried by appraisers or commissioners, it becomes a question of fact to be determined in that particular case.<sup>5</sup>

In ordinary highway cases an important issue of fact often is, whether the highway sought to be opened is or is not one of public utility, and this is but another form of ascertaining whether it is required by public necessity, for what is demanded by the public welfare, comfort or convenience, is esteemed a necessity. It is competent for the legislature to commit to local tribunals the decision of the question whether, in particular cases which may arise under a general law, the proposed street or road is one required for the welfare of the public.

The decision of the question whether a public necessity exists is ultimately a legislative one, and, in the absence of ex-

<sup>1</sup> But so far as the question of whether there has been due process of law is involved it is probably true that the constitution of the United States is the paramount law. *Scott v. City*, 36 Fed. 385.

<sup>2</sup> *Cooley Const. Lims.* 524; *Blackman v. Halves*, 72 Ind. 515.

<sup>3</sup> *Corey v. Swagger*, 74 Ind. 211.

<sup>4</sup> *Iron R. R. Co. v. Ironton*, 19 Ohio St. 299; *Boom Co. v. Patterson*, 98 U. S. 403; *U. S. v. Harris*, 1 Sumner, 21; *Ford v. Chicago, etc.*, 14 Wis. 609; *People v. Smith*, 21 N. Y. 595; *Buffalo,*

*etc.*, *Co. v. Brainard*, 9 N. Y. 100; *County Court v. Griswold*, 58 Mo. 165; *Chicago, etc., Co. v. Wiltse*, 116 Ill. 449; *Water Works Co. v. Burkhardt*, 41 Ind. 364; *Varick v. Smith*, 5 Paige Ch. 137, S. C. 28 Am. Dec. 417; *Anderson v. Turberville*, 6 Coldw. 150; *Dayton Mining Co. v. Seawall*, 11 Nev. 394.

<sup>5</sup> *Comm'rs Court v. Bowie*, 34 Ala. 461; *State v. Bishop*, 39 N. J. Law, 226; *Dunham v. Hyde Park*, 75 Ill. 371; *Kelsey v. King*, 32 Barb. 410; *Stout v. Freeholders*, 25 N. J. Law, 202.

press constitutional restrictions, the legislature may determine it without the intervention of a judicial tribunal. There rests upon the legislature no duty to submit the question to any tribunal, unless that duty be imposed by some express constitutional provision. It may be done as a matter of favor, but it can not be insisted upon as a matter of right.<sup>1</sup> The legislature does not, however, possess the power to conclusively determine that the purpose for which it is proposed to seize the property is a public one. Courts will treat with great respect the legislative decision expressed in the statute, but will not yield to it as conclusive.<sup>2</sup>

Roads and streets used by the public, with a right in all the public to use them, are undoubtedly public, and private property may be appropriated for the purpose of constructing such ways. The test is, not simply how many persons do actually use them? but, how many have a free and unrestricted right in common to use them? for, if the public generally are excluded the way must be regarded as a private one; if the public have the right to use the way at pleasure and on equal terms, it is a public one, although in reality it is little used.<sup>3</sup> Where the way is a private one the right of eminent domain can not be successfully invoked.<sup>4</sup> There is, we are aware, some conflict of

<sup>1</sup> *People v. Smith*, 21 N. Y. 595; *Ford v. Chicago*, etc., 14 Wis. 617; *Hyles v. Risher*, 32 Pa. St. 169; *Chicago*, etc., *v. Lake*, 71 Ill. 333; *Warren v. St. Paul*, 18 Minn. 384; *Challis v. Atchison*, etc., Co., 16 Kan. 117; *North Missouri*, etc., *v. Gott*, 25 Mo. 540; *Mills Eminent Domain*, section 11; *Cooley Const. Limitations* (5 ed.), 668.

<sup>2</sup> *Pittsburgh*, etc., Co. *v. Bentwood*, etc., *Works* (W. Va.), 8 S. E. R. 453; *Matter of Deansville Cemetery*, 66 N. Y. 569, S. C. 23 Am. Rep. 86.

<sup>3</sup> *Bankhead v. Brown*, 25 Iowa, 540; *Sadler v. Langham*, 34 Ala. 311; *Savannah v. Hancock*, 91 Mo. 54; *Reynolds v. Reynolds*, 15 Conn. 83; *Warren v. Bunnell*, 11 Vt. 600; *Sherman v. Buick*, 32 Cal. 241; *Shaver v. Starrett*,

4 *Ohio St.* 494; *Petition of Mt. Washington Co.*, 35 N. H. 134; *Coster v. Tide Water Co.*, 18 N. J. Eq. 54; *O'Reiley v. Kankakee Co.*, 32 Ind. 169.

<sup>4</sup> *Varner v. Martin*, 21 W. Va. 534; *Rice v. Alley*, 1 Sneed, 51; *Roberts v. Williams*, 15 Ark. 43; *Bankhead v. Brown*, 25 Ia. 540; *Clack v. White*, 2 Swan, 540; *Crear v. Crossly*, 40 Ill. 175; *Osborn v. Hart*, 24 Wis. 89, S. C. 1 Am. Rep. 161; *Witham v. Osburn*, 4 Ore. 318, S. C. 18 Am. Rep. 287; *Dickey v. Tennison*, 27 Mo. 373; *Taylor v. Porter*, 4 Hill, 140, S. C. 40 Am. Dec. 274; *Nesbit v. Trumbo*, 39 Ill. 110, 116; *Sadler v. Langham*, 34 Ala. 311; *Stewart v. Hartman*, 46 Ind. 331; *Mohawk*, etc., Co. *v. Archer*, 6 Paige, 83.

authority upon this question,<sup>1</sup> but the weight of authority is very decidedly in favor of the doctrine we have laid down, and it seems to us that to declare any other would be a departure from principle. The right itself exists only for the public, and no private interest, however weighty, can call it into exercise. The question, therefore, must always be, not what private interests will be promoted, but what is the public requirement? The name given the way does not determine its character, for if a road be called a private road, or a neighborhood road, but is, in fact, so laid out and maintained as to give the public a right to freely use it, upon terms common to all, the road, notwithstanding its name, is a public one. If, on the other hand, the road is so laid out and maintained as to give only a limited class of persons the sole right to use it, then it is a private road, no matter what name is bestowed upon it. This is so, no matter whether the right to use it is vested in the persons because they reside in the neighborhood, or because they, at their own charge, maintain the way. If a class, to the exclusion of the citizens generally, acquire a right to use the road, it is no more than a private way.<sup>2</sup>

Private property can only be taken pursuant to "the law of the land," but when a valid statute is enacted conferring the right to condemn land, it stands as such a law, and property taken under it is deemed to be seized by virtue of the "law of

<sup>1</sup> *Brewer v. Bowman*, 9 Ga. 37; *Robinson v. Swope*, 12 Bush. 21. Upheld for the use of persons who can not otherwise reach a highway. *Matter of Hickman*, 4 Harr. 580; *Denham v. Co. Comm'rs*, 108 Mass. 202; *Killbuck Private Road*, 77 Pa. St. 39. May be exercised as to "pent" roads in Vermont on the ground that they are public. *Warren v. Bunnell*, 11 Vt. 600; *Prouty v. Bell*, 44 Vt. 72. So as to public road for mere pleasure. *Higginson v. Inhabs.*, 11 Allen, 530; *Petition of Mt. Washington Road Co.*, 35 N. H. 135.

<sup>2</sup> *Wild v. Deig*, 43 Ind. 455, see p. 460, 461; *Sadler v. Langham*, 34 Ala.

311, *Osborn v. Hart*, 24 Wis. 89; *Gilmer v. Lime Point*, 18 Cal. 251. If, however, the road is free to all, it may be a public road although maintained at private expense. *Shayer v. Starrett*, 4 Ohio St. 494; *Denham v. County Comm'rs*, 108 Mass. 202; *Davis v. Smith*, 130 Mass. 113; *Wolcott v. Whitcomb*, 40 Vt. 40; *Perrine v. Farr*, 22 N. J. Law, 356; *Metcalf v. Bingham*, 3 N. H. 459; *Procter v. Andover*, 42 N. H. 348; *Butte Co. v. Boydstown*, 64 Cal. 110; *Brewer v. Bowman*, 9 Ga. 37; *Hickman's Case*, 4 Harr. (Del.) 580; *Roberts v. Williams*, 15 Ark. 43.



the land."<sup>1</sup> It requires legislative action, embodied in the form of a statute, to confer a right to appropriate private property, for the constitution does not either create or execute the right of eminent domain. It is only called into exercise by the ruling power, and with us that is the legislature acting under the constitution and in accordance with its terms.<sup>2</sup> Statutes which confer a right to seize private property are to be strictly construed.<sup>3</sup> The right to exercise the power exists only by virtue of a statute conferring it; until that time the power resides in the legislature, but is inactive, and no person or corporation can possess or exercise the right unless it is conferred by legislative enactment.<sup>4</sup>

The power is one which the legislature may delegate.<sup>5</sup> Where there is a delegation of power the mode of procedure must be prescribed by statute, for without such a statute there can be no "law of the land," and, as private property can

<sup>1</sup> Cooley Const. Lim. 528; Alexandria, etc., R. R. Co. v. A. & W. R. R. Co., 75 Va. 780; Secombe v. Railroad Co., 23 Wall. 108. See note to Bank v. Cooper, 24 Am. Dec. 537.

<sup>2</sup> Chicago, etc., R. R. Co. v. Town of Lake, 71 Ill. 333; Tyler v. Beacher, 44 Vt. 649, S. C. 8 Am. Rep. 398; Beekman v. Saratoga, etc., R. R. Co., 3 Paige Ch. 45, S. C. 22 Am. Dec. 679.

<sup>3</sup> Washington Cemetery v. P. P. & C. I. R. R. Co., 68 N. Y. 591; Currier v. Marietta, etc., R. R. Co., 11 Ohio St. 231; Harding v. Goodtel, 3 Yerger (Tenn.), 40, S. C. 24 Am. Dec. 546; Cooley Const. Lim. 530; Alexandria, etc., R. R. Co. v. A. & W. R. R. Co., 75 Va. 780.

<sup>4</sup> Allen v. Jones, 47 Ind. 438; Barrow v. Page, 5 Hayw. 97; Railroad Company v. Lake, 71 Ill. 333; Philips v. Dunkirk, etc., Co., 78 Pa. St. 187; Dyckman v. Mayor, 5 N. Y. 434; McCormick v. President, etc., 1 Ind. 48; Droneberger v. Reed, 11 Ind. 420.

<sup>5</sup> It is sometimes said that the power of eminent domain can not be delegated, but that the legislature may choose the

instrumentalities which shall exercise it. Sholl v. German Coal Co., 118 Ill. 427; Yost's Report, 17 Pa. St. 524; Matter of Deansville, etc., Asso., 5 Hun. 482. Strictly speaking, it may, perhaps, be true that a sovereign power can not be delegated, but it is quite certain that it may be entrusted to public and private corporations and that the courts commonly speak of "the delegation of the right of eminent domain." Bloodgood v. Mohawk, etc., Co., 18 Wend. 9; Ash v. Cummings, 50 N. H. 591; Tidewater Canal Co. v. Archer, 9 & Gill. J. (Md.) 479; Hand, etc., Co. v. Parker, 59 Ga. 419; Burt v. Merchants, etc., Co., 106 Mass. 356; Gilmer v. Lime Point, 18 Cal. 229; Dodge v. Council Bluffs, 57 Iowa, 560; Abbott v. New York, etc., Co., 145 Mass. 450; Gray v. St. Louis, etc., Co., 81 Mo. 126; Mineral, etc., Co. v. Detroit, etc., Copper Co., 25 Fed. R. 515; Philadelphia R. R. Co.'s Appeal, 102 Pa. St. 123; Young v. Buckingham, 5 Ohio, 485; Moody v. Jacksonville R. R., 20 Fla. 597; Alexandria R. R. v. A. & W. R. R., 75 Va. 780.

only be taken by virtue of such a law, it follows that where there is no statute there is no right of seizure.<sup>1</sup> It is, of course, necessary that the law should prescribe some method of procedure by which the character of the use may be determined, in cases where the statute itself does not determine that question, and for ascertaining the amount of benefit and damages which will accrue to the property owner from the appropriation of the land.<sup>2</sup>

The constitutional provision that "the right of trial by jury shall remain inviolate," does not require that statutes conferring authority to seize public property for public purposes shall provide for trial by jury, and it is, therefore, within the power of the legislature to deny a jury trial.<sup>3</sup> The right to trial by jury meant by the constitutional provision is the common law and historic right declared by the common law courts, and perpetuated by the *Magna Charta*.<sup>4</sup> The right to trial by jury in cases of the seizure of private property for public uses did not exist at common law. It is, indeed, the theory of the English constitution that private property may be taken without compensation, for, according to that theory, the Parliament is omnipotent. This theory leads, necessarily, to the conclusion that, at common law, damages for the seizure of land were such only as the statute provided and were recoverable only in the mode prescribed by the statute. It is said, however, that the British Parliament has always required compensation, and that a rule requiring compensation has grown up and become too fully established to be disregarded. But however this may be, it is clear that it was

<sup>1</sup> 2 Dillon's Municipal Corp. (3 ed.), sections 602, 604. See *Matter of City of Buffalo*, 78 N. Y. 362; *Philadelphia v. Scott*, 81 Pa. St. 80, S. C. 22 Am. Rep. 738.

<sup>2</sup> *Ames v. Lake Sup., etc., Co.*, 21 Minn. 241; *Allen v. Jones*, 47 Ind. 442; 2 Dillon's Municipal Corp. (3 ed.), § 618; *Bloodgood v. Mohawk, etc., R. R. Co.*, 18 Wend. 9, S. C. 31 Am. Dec. 313.

<sup>3</sup> *Williard v. Hamilton*, 7 Ohio, 111, S. C. 30 Am. Dec. 195; *Beekman v. Saratoga, etc., R. R. Co.*, 3 Paige Ch.

45, S. C. 22 Am. Dec. 679; *Scudder v. Trenton Del. Falls Co.*, 1 Saxton Ch. 694, S. C. 23 Am. Dec. 756; *Backus v. Lebanon*, 11 N. H. 19, S. C. 35 Am. Dec. 466; *Copp v. Henniker*, 55 N. H. 189; *Trigally v. Memphis*, 6 Coldw. 385.

<sup>4</sup> *Anderson v. Caldwell*, 91 Ind. 454; *Butler v. Worcester*, 112 Mass. 541; *Cramer v. Cleveland R. R. Co.*, 5 Ohio St. 140; *Penna. Co. v. Lutheran Congregation*, 53 Pa. St. 445; 2 Hare's Const. Law, 869, note 4.

competent for Parliament to grant or deny a trial by jury, and from this the logical conclusion is, that when our constitutions, national and State, were adopted, there was no right to a trial by jury in cases where property was seized under the right of eminent domain, and as these constitutions did not create a new right, but simply preserved inviolate an existing one, they do not restrict Congress or the State legislatures from giving, or denying, a trial by jury.

The person whose property is sought to be condemned is entitled to notice in some form, since to hold otherwise would be to affirm that the government has a right to take from him his property without giving him an opportunity to be heard. It would be contrary to "the law of the land" to take private property without giving the owner his "day in court," and on principle a statute denying this right should be deemed invalid. The very decided weight of authority is in favor of this view of the question.<sup>1</sup> It is certainly the general rule that in all cases where personal interests or property rights are to be affected, notice in some form should be given, and there is no reason why this rule should not apply where property is sought to be compulsorily taken from the owner under the extraordinary power of eminent domain.<sup>2</sup> This general rule, so necessary for the protection of the citizen, applies to assessments for taxation, and there is much stronger reasons for applying it to proceedings to appropriate property to public use.<sup>3</sup> The statement made by Mr. Mills, in his work on Eminent Domain, that notice is not essential, is not supported by the cases to which he

<sup>1</sup>Campbell v. Dwiggins, 83 Ind. 473; Lake Shore, etc., Co. v. Cincinnati, etc., Co., 116 Ind. 578; Stuart v. Palmer, 74 N. Y. 183; Johnson v. Joliet, etc., Co., 23 Ill. 202; Matter of Village of Middletown, 82 N. Y. 196; Seifert v. Brooks, 34 Wis. 443; Langford v. Comm'rs, 16 Minn. 375; Rutherford's Case, 72 Pa. St. 82, S. C. 13 Am. Rep. 655; County of San Mateo v. Southern, etc., R. R. Co., 8 Am. & Eng. R. R. Cas. 1 op. 27 *et seq.* And see Bostwick v. Isbell, 41 Conn. 305, 307; Cooper v.

Board, 108 Eng. Com. L. 181. In Swan v. Williams, 2 Mich. 427, it is held without discussion, and on the authority of Beekman v. Saratoga, etc., Co., 3 Paige, 45, and Bonaparte v. Com., etc., Co., 1 Baldw. 205, that no notice is required, but this case can not be sustained on principle, and the cases cited as supporting the decision do not lend it the slightest support.

<sup>2</sup>Cooley's Const. Lim. 497, 502.

<sup>3</sup>Cooley Const. Lim. (5th ed.) 615, auth. n. 2.

refers.<sup>1</sup> In one of the cases it was held that where the property owner actually appeared before the appraisers, the question of the constitutionality of the law did not arise,<sup>2</sup> but even this holding can not be sound. As the right can only exist where there is a valid statute, the validity of the statute must always be a controlling question, and one not waived by appearance before the appraisers. The other case cited by this author decides nothing more than that personal notice to the owner is not required.<sup>3</sup> We think reason and authority support Chancellor Kent's statement that "The government is bound in such cases to provide some tribunal for the assessment of the compensation or the indemnity, before which each party may meet and discuss their claims on equal terms."<sup>4</sup> It is idle to assert that parties can meet on equal terms where no provision is made requiring notice, for without notice the proceeding is entirely unilateral. It is one thing to affirm that notice is required, and quite another to affirm that it must be personal notice, and we are not to conclude that because it is sometimes said that no personal notice is required, therefore no notice at all is essential. There are cases where personal notice is indispensable, and others where constructive notice, as by publication in a newspaper, or by posting in public places, will be sufficient.

Notwithstanding the diversity of opinion upon the question whether the failure to provide for notice will or will not make the statute inoperative, it seems clear to us, on principle, that a statute which makes no provision for notice can not be deemed effective. Such a statute may not, perhaps, be absolutely void since it is probably true that the defect might be remedied by a supplemental or amendatory statute, but however this may be, as long it stands without a provision for notice it is inoperative

<sup>1</sup> Mills Eminent Domain, section 94.

<sup>2</sup> *Kramer v. Cleveland, etc.*, 5 Ohio St. 140. The dissenting opinion in this case is much better sustained by principle and authority than the prevailing opinion. Nor was the question really decided, for what was decided is, that there was a waiver of notice.

<sup>3</sup> *Harper v. The Lexington, etc., Co.*, 2 Dana (Ky.), 227.

<sup>4</sup> 2 Kent Com. 399; *Redfield v. W. 140*; *Symonds v. City of Cincinnati*, 14 Ohio, 174; *Gardner v. Village*, 2 John. Ch. R. 166.

and will not justify the seizure of private property. It is everywhere agreed that a statute which fails to make proper provision for compensation is ineffective, because provision for compensation is an indispensable condition to the right to exercise the power, and the principle declared in the decisions establishing that doctrine applies to the element of due process of law, for it is quite as essential that the statute should provide for due process of law as for compensation. A notice not provided for by law is, in truth, no notice at all, and it is the province of the legislature and not of the courts to enact laws which shall prescribe the notice that brings parties into court. If no notice is provided by law no effective notice can be given, since a notice not authorized can have no legal force, and without a notice authorized by some valid statute, there can be no due process of law.<sup>1</sup> The courts have no right to supply the omission by interpolating provisions, for it is their duty to give effect to the statutes as they are written, and they can not amend imperfect enactments.

Where property is within the jurisdiction of the court, and the process is directed against the property solely and no personal judgment is sought, constructive notice is generally deemed sufficient.<sup>2</sup> Upon notice of this character, a valid judgment may be rendered against the property, but no personal liability can be fastened on the defendant. As proceedings to appropriate land are against the property itself, and not against the person, it is competent for the legislature to provide for constructive instead of personal notice.<sup>3</sup> We may conclude, therefore, that the statute must provide for some notice, actual or constructive, or

<sup>1</sup> *Stuart v. Palmer*, 74 N. Y. 183; *Johnson v. Joliet*, 23 Ill. 202; *Gavin v. Daussman*, 114 Ind. 429; *Kuntz v. Sumption*, 117 Ind. 1; *State v. Fond du Lac*, 42 Wis. 287; *Seifert v. Brooks*, 34 Wis. 443; *Whiteford Tp. v. Probate Judge*, 53 Mich. 130.

<sup>2</sup> *Beard v. Beard*, 21 Ind. 321; *Nations v. Johnson*, 24 How. 195; *Rockwell v. Nearing*, 35 N. Y. 302. *Matter of Petition of De Peyster*, 80 N. Y. 565; *Palmyra v. Morton*, 25 Mo. 593.

<sup>3</sup> *Empire City Bank*, 18 N. Y. 199; *Cupp v. Commissioners*, 19 Ohio St. 173; *Starbuck v. Murray*, 5 Wend. 148, S. C. 21 Am. Dec. 172; *Owners v. Mayor*, 15 Wend. 374; *Polly v. Saratoga*, 9 Barb. 449; *Wilkin v. St. Paul*, 16 Minn. 271; *New Orleans, etc., Co. v. Hemphill*, 35 Miss. 17; *Missouri, etc., Co. v. Shepard*, 9 Kansas, 647; *Weir v. St. Paul, etc., Co.*, 18 Minn. 155; *Wilson v. Hathaway*, 42 Ia. 173.

it will be unconstitutional, but that it is for the legislature to determine what kind of notice shall be given.<sup>1</sup> It is often said that the legislature may, at their pleasure, prescribe the kind and character of the notice, but it may be doubted whether this is not a broader statement of the rule than should be made. We suppose that a notice palpably unreasonable could not be deemed such as the law of the land requires, and that the question of whether the notice was, or was not, clearly unreasonable, would ultimately fall to the courts for decision. A notice clearly insufficient to afford an opportunity to be heard could not be justly allowed to uphold proceedings appropriating property, for in such a case there could be no due process of law, and whether there has been due process of law is certainly a judicial and not a legislative question.

The legislature may decide the question of the necessity of appropriating the land, and need not submit that question to any tribunal. It follows from this that while the legislature may submit this question to inferior tribunals and may require notice, they are not bound to provide for notice on this question, although they are bound to provide for notice on the question of compensation. There is, therefore, a clear distinction between cases involving the right to compensation and cases where the question of necessity is at issue. The rule which applies to the one class of cases can not, with reason, be applied to the other. Losing sight of this distinction some of the courts in their reasoning have become confused, and have erroneously intimated that as notice is not necessary in the one class of cases it is not in the other. It is, however, quite well settled by the cases which have given the subject careful consideration, that a statute will be valid which determines without any intervention the question of the necessity for the appropriation, or submits it, without providing for notice, to an inferior tribunal, but that a statute which undertakes to determine the question of compensation or to submit it to commissioners or appraisers,

<sup>1</sup> Walker v. Boston & M. R. R., 3 Iowa, 261; Matter of Village of Mid-Cush. 1; Salem v. Eastern Co., 98 dletown, 82 N. Y. 196. Mass. 431; Mason v. Messenger, 17.

without providing for notice, is unconstitutional.<sup>1</sup> The infirmity is in the statute; and as an unconstitutional statute is absolutely inoperative, it is difficult, if not impossible on any logical or legal basis, to perceive how it can be held that any individual can waive the question. Doubtless he may waive his individual rights, but certainly not upon the ground that he confirms an ineffective statute. Where there is a statute providing for notice, the question assumes a very different form from that which it takes where the question is as to the validity of the statute on which the whole proceeding rests, and it is only of the former class that we are now speaking.

<sup>1</sup> *People v. Smith*, 21 N. Y. 595; *New Central*, 40 Md. 425; *Zack v. Pa. R. R. York Elevated R. R. Co.*, 70 N. Y. Co., 25 Pa. St. 394.  
327; *Georges Creek Coal Co. v. New*

## CHAPTER VIII.

### WHAT CONSTITUTES A TAKING.

The provisions in the various State constitutions securing compensation for property appropriated to a public use do not, in terms, import that the owner shall receive compensation for all injuries which may result from the construction of a street or road, nor have the courts carried the rule established by the constitutional provisions to that extent. Those only are entitled to compensation whose property is taken, and it is not every resulting injury that can be regarded as a taking within the letter or spirit of the constitution. If the language of that instrument were strictly adhered to, it would require that it be held that nothing short of an actual seizure of the *corpus* of property would entitle an owner to demand compensation, but the rule adopted by the courts is much more liberal to the owner.<sup>1</sup> A change of title, the destruction of a substantial right, immediately and directly resulting from the public work, the subjection of the land to an easement or any other burden incompatible with the dominion of the owner, or the serious interference with the use or enjoyment of property, will be deemed a taking within the meaning of the organic law.<sup>2</sup> An incident annexed to land may be of value, and to wrest such a thing from the owner for a public use is to take from him his property. The term "property" is by no means limited to land itself, but embraces all the incidents which give it value to the

<sup>1</sup> *City of Denver v. Bayer*, 7 Col. 113, Am. Rep. 147; *East Pa. Co. v. Schollenberger*, 54 Pa. St. 144; 2 *Austin's Juris.* (3d ed.) 817; *Walker v. O. C. R. R.*, 103 Mass. 10; *Coke Litt.* 4, *b*; *Smith v. City of Rochester*, 92 N. Y. 463; *Wynehamer v. People*, 13 N. Y. 378. See op. p. 433; *Eaton v. B. C. & M. R. R.*, 51 N. H. 504, S. C. 12

*Reeves v. Treas.*, 8 Ohio St. 333; *Pettigrew v. Village*, 25 Wis. 223; *Transportation Co. v. Chicago*, 99 U. S. 635.



owner, and includes the rights which pertain to the ownership of things real and personal, and, whenever there is a direct and substantial invasion of these rights, there is a taking in the constitutional sense conferring upon the owner a right to compensation. There may be a taking although manual possession is not taken.<sup>1</sup>

An injury to the use of property may take from the owner a thing of value as effectually as the actual manual seizure of corporeal property.<sup>2</sup> Thus, the construction of a public way which deprives the owner of the use of a non-navigable stream is a taking within the meaning of the constitution,<sup>3</sup> and so, also, is a destruction of the right of wharfage.<sup>4</sup> Where a corporate franchise is directly and materially impaired, there is a taking.<sup>5</sup> The constant or intermittent flowing of lands caused by the construction of embankments or dams across public streams, is also deemed a taking of property.<sup>6</sup> The right of an owner of land abutting on a public street is property in such a sense as to entitle him to compensation, in case the street is appropriated to a use which deprives it of its character as a public way.<sup>7</sup> Throwing an arch over land, or constructing a tun-

<sup>1</sup> *Arnold v. Hudson River Co.*, 55 N. Y. 661; *Story v. Elevated R. R. Co.*, 90 N. Y. 122; *Rigney v. Chicago*, 102 Ill. 76; *Richardson v. Vermont Central*, 25 Vt. 465; *City of Aurora v. Reed*, 57 Ill. 29.

<sup>2</sup> *Hooker v. New Haven, etc., Co.*, 14 Conn. 146, S. C. 36 Am. Dec. 477; *Pumpelly v. Green Bay, etc., Co.*, 13 Wall. 166; *Arimond v. Green Bay*, 31 Wis. 316; *Ashley v. Port Huron*, 35 Mich. 296; *City of Omaha v. Kramer (Neb.)*, 41 N. W. R. 295; *Grand Rapids Co. v. Jarvis*, 30 Mich. 308; *Mortimer v. N. Y. El. R. R. Co.*, 6 N. Y. S. R. 898; *Campbell v. Metropolitan, etc., Co. (Ga.)*, 9 S. E. R. 1078; *Appeal of Beraler (Pa.)*, 17 Atl. R. 244; *Organ v. Memphis, etc., Co. (Ark.)*, 11 S. W. R. 96.

<sup>3</sup> *Smith v. City of Rochester*, 92 N. Y. 463; *Varick v. Smith*, 5 Paige, 143; *Yates v. Milwaukee*, 10 Wall. 497.

<sup>4</sup> *Boston Water Power v. Boston, etc.,*

*Co.*, 23 Pick. 360; *Matter of Hamilton Co.*, 14 Barb. 405.

<sup>5</sup> *Murray v. Sharp*, 1 Bosw. 539.

<sup>6</sup> *Ten Eyck v. Canal Co.*, 3 Harrison (18 N. J. L.), 200; *Lee v. Pembroke, etc., Co.*, 57 Me. 481; *Evansville, etc., Co. v. Dick*, 9 Ind. 433; *Wabash, etc., Canal v. Spears*, 16 Ind. 441.

<sup>7</sup> *Chicago, etc., Co. v. Hazels (Neb.)*, 42 N. W. R. 93; *Central Branch, etc., R. R. v. Andrews (Kan.)*, 21 Pac. R. 276; *State v. Berdett*, 73 Ind. 185; *Haynes v. Thomas*, 7 Ind. 38; *Ross v. Thompson*, 78 Ind. 92; *Morgan v. Railroad*, 96 U. S. 716; *Corning v. Lowerie*, 9 John. Ch. 439; *Mayor v. Franklin*, 12 Ga. 239; *City of Peoria v. Johnson*, 56 Ill. 45; *Baker v. Johnston*, 21 Mich. 319; *Lackland v. North Mo. R. R.*, 31 Mo. 180; *State v. Cincinnati Gas Co.*, 18 Ohio St. 262; *Port Huron, etc., R. W. Co. v. Voorheis*, 50 Mich. 506; *Irrlay v. Union Branch R. R.*, 26 Conn. 249.

nel through it,<sup>1</sup> constitutes a taking, and so, also, does the use of land as a place of deposit for rubbish.<sup>2</sup> Casting sand and gravel on the land of an adjoining owner, during the improvement of a street, entitles him to compensation, although consequential injuries resulting from the improvement of a street in a careful and skillful manner will not give the owner a right of action nor constitute a taking of property.<sup>3</sup>

An owner whose land adjoins a public street is entitled to have the lateral support of his land remain undisturbed, and a wrongful destruction of it has been held to be a taking within the meaning of the constitution.<sup>4</sup> Lateral support is the right which soil in its natural state has to support from land adjoining it. One of the old principles of the law is that soil in its natural state is entitled to this support, but the rule does not go farther than this, for the right to support extends only to the soil, and not to structures placed upon it.<sup>5</sup> There is, therefore, ample reason for holding that the destruction of the right of lateral support, giving to the term its true legal signification, is a taking of property, but when we undertake to extend the doctrine so far as to embrace a right to support for the soil burdened with structures there is difficulty. The general rule is that, after the right to a street has been acquired, the municipal corporation may use it as a private owner may do his own property,<sup>6</sup> and, as a private owner is not bound to leave support for

<sup>1</sup> Pinchin & Co. v. Blackwell R. R. Co., 5 De G. M. & G. 851; Sparrow v. Oxford, etc., Co., 2 De G. M. & G. 94; Ramsden v. Manchester, etc., Co., 12 Jones, 293.

<sup>2</sup> East Pa. Co. v. Schollenberger, 54 Pa. St. 144.

<sup>3</sup> Platter v. City of Seymour, 86 Ind. 324; Town of Martinsville v. Shirley, 84 Ind. 546; City of Evansville v. Decker, 84 Ind. 325, S. C. 43 Am. R. 86; Hendershott v. Ottumwa, 46 Ia. 658, S. C. 26 Am. R. 182.

<sup>4</sup> Richardson v. Central R. R. Co., 25 Vt. 465; Dyer v. St. Paul, 27 Minn. 457; O'Brien v. St. Paul, 25 Minn. 331; Buskirk v. Strickland, 47 Mich. 389.

And see Transportation Co. v. Chicago, 99 U. S. 635.

<sup>5</sup> 18 Am. Law Register, 529; 17 Am. Law Register, 645, n; Rolles Abridg. Trespass, 1; Washburne Easement, 542; Cooley Torts, 594; 1 Addison Torts, section 84; Thurston v. Hancock, 12 Mass. 220, S. C. 7 Am. Dec. 57; Gilmore v. Driscoll, 122 Mass. 199, 207.

<sup>6</sup> Callender v. Marsh, 1 Pick. 418; Radcliffe's Ex. v. Brooklyn, 4 Const. 195; City of Pontiac v. Carter, 32 Mich. 164; Macy v. City of Indianapolis, 17 Ind. 267; Hoffman v. St. Louis, 15 Mo. 651; White v. Yazoo, 27 Miss. 357; Commisioner v. Withers, 29 Miss. 21; Smith v. Washington, 20 How. 135;

soil burdened with buildings, it would follow that a public corporation is under no greater obligation.<sup>1</sup> Where, however, property is taken which affords support to a building occupying part of the same parcel and belonging to the same owner, a different rule should apply, for the owner is entitled to all the benefit from his land, and the support yielded to adjoining soil and buildings is a benefit of a substantial character.

A change from a private to a public way is such a change as increases the extent of the servitude and entitles the owner of the fee to compensation.<sup>2</sup> An easement in land is property and a destruction of such an interest is a taking.<sup>3</sup> When the immediate consequence of the construction of a street or road is to divert the flow of water from its natural channel and cast it upon the land of the adjoining proprietor, there is the creation of an easement for which compensation should be awarded, but where there is a mere disturbance of the flow of surface water, and no collection of it into a body requiring a channel for its flow, then there can not be said to be a taking.<sup>4</sup> This we think a just deduction from the decided cases, as well as from principle, for subjecting land to the burden of the flow of water collected into one channel is interfering with its use and enjoyment by the owner, and this is a legal injury.<sup>5</sup>

*Reading v. Keppleman*, 61 Pa. St. 233, *O'Connor v. Pittsburg*, 18 Pa. St. 187; *Rome v. Omberg*, 28 Gall. 46, *Hovey v. Mayo*, 43 Me. 322; *Ellis v. Iowa City*, 29 Ia. 229; *Murphy v. Chicago*, 29 Ill. 279; *Humes v. Mayor*, 1 Humph. 403; *Rounds v. Mumford*, 2 R. I. 154.

<sup>1</sup>*Transportation Co. v. Chicago*, 99 U. S. 635; *Eaton v. Boston, etc., R. R. Co.*, 51 N. H. 504, 5 S. C. 12 Am. Rep. 147, 174; *Keasy v. Louisville*, 4 Dana, 154; *Mitchell v. Rome*, 49 Ga. 19, 5 S. C. 15 Am. Rep. 669; *Quincy v. Jones*, 76 Ill. 231.

<sup>2</sup>*Abbott v. Stewartstown*, 47 N. H. 228; *Gear v. Railroad Co.*, 39 Iowa, 23.

<sup>3</sup>*Arnold v. Hudson R. R.*, 55 N. Y. 661; *Matter of Eleventh Ave.*, 81 N. Y. 436; *Sinnickson v. Johnson*, 2 Harrison (N. J.), 129; *Bridge Co. v. U. S.*, 105 U. S. 502.

<sup>4</sup>*Grand Rapids, etc., Co. v. Jarvis*, 30 Mich. 308; *Pumpnelly v. Green Bay*, 13 Wall. 166; *Eaton v. B. & C. R. R.*, 51 N. H. 504; *Gardner v. Newburgh*, 2 Johns. Ch. 162; *Linnickson v. Jackson*, 2 Harrison (N. J.), 129; *Canal Appraisers v. People*, 17 Wend. 604; *Lee v. Pembroke*, 57 Me. 481; *Morris Canal v. Seward*, 23 N. J. L. 219; *Wabash & E. Canal v. Spears*, 16 Ind. 441, *Glover v. Powell*, 10 N. J. Eq. 211; *Stevens v. Middlesex Canal Co.*, 12 Mass. 466.

<sup>5</sup>*Druley v. Adam*, 102 Ill. 177; *Mayor v. Appold*, 42 Md. 442; *Gladfelter v. Wadkins*, 40 Md. 1; *Richmond, etc., Co. v. Atlantic, etc., Co.*, 10 R. I. 106; *Butler v. Mayor*, 74 Ga. 570. In *Evansville, etc., Co. v. Dick*, 9 Ind. 433, the word "taking" was said to mean "seized, injured, destroyed, deprived

The diversion of an existing way to a new use does not always give the owner of the soil a right to compensation. If the burden is materially increased, or the change in the use is such as to depreciate the value of the owner's adjoining land, and the depreciation is the direct and natural result of the change, there is a taking of property within the meaning of the constitution.<sup>1</sup> It is obvious that the question assumes a very different form as between the owner of the fee and the claimant of the new use from that which it takes where the contestants are the owners of the old way and the claimants of the new. Thus, if a turnpike should be condemned by a railroad company, the question between the two companies would be very different from that which would arise between the owner of the soil and the railroad company. The rights of which we are now speaking are those of the owner of the soil and not those of the corporation whose existing rights have been seized.

It is difficult to determine what shall be considered an additional burden, entitling the owner of the fee to the protection of the constitutional provision limiting the right of eminent domain. If the new use is radically distinct and different from the former, there must be a new assessment of compensation,

of," and it is this signification which the cases generally give to the word, for it is held that any material impairment of a property right is a taking. *Dickson v. Chicago Pac. Co.*, 71 Mo. 575; *Delaware, etc., Co. v. Lee*, 22 N. J. L. 243; *Union, etc., Co. v. Dyche*, 31 Kansas, 120; *Barnes v. City of Hannibal*, 71 Mo. 449; *Hebron, etc., Co. v. Harvey*, 90 Ind. 192; *Barrett v. Bangor*, 70 Me. 335; *Chenango Bridge Co. v. Paige*, 83 N. Y. 178. This general doctrine is illustrated in the cases respecting the rights of abutting owners. *Indiana, etc., Co. v. Eberle*, 110 Ind. 542; *Transylvania University v. Lexington*, 3 B. Mon. 25; *Chicago v. Union Building Ass'n*, 102 Ill. 379; *Lackland v. North, etc., R. R.*, 31 Mo. 180; *People v. Kerr*, 27 N. Y. 188; *Burlington, etc., Co. v. Reinhackle*, 15

*Neb.* 279; *Shawneetown v. Mason*, 82 Ill. 337; *Winchester v. Stevens' Point*, 58 Wis. 350; *Buchner v. Chicago, etc., Co.*, 60 Wis. 264; *Trustees, etc., Co. v. Rochester, etc., Co.*, 3 Hill, 567. The subject is well discussed in *Barnett v. Johnston*, 15 N. J. Eq. 481.

<sup>1</sup>*Stetson v. Bangor*, 60 Me. 313. See *Moale v. Baltimore*, 5 Md. 314; *Pinkerton v. Boston, etc., R. R. Co.*, 109 Mass. 527; *Gardiner v. Newburgh*, 2 Johns. Ch. 162; *Toledo, etc., Co. v. Morrison*, 71 Ill. 616; *Hooker v. New Haven, etc., Co.*, 14 Conn. 146; *Stone v. Railroad*, 68 Ill. 394; *Eaton v. Railroad*, 51 N. H. 504; *Evansville, etc., Co. v. Dick*, 9 Ind. 433; *Terre Haute, etc., Co. v. McKinly*, 33 Ind. 274; *Grand Rapids, etc., Co. v. Jarvis*, 30 Mich. 308; *City v. Soden*, 25 Kan. 588.

and the decided weight of authority is that constructing an ordinary railroad on a street or road is a change of use entitling the owner of the soil to compensation.<sup>1</sup> Some of the courts hold that when the fee of the streets is in the public they may be taken for the purpose of a railroad,<sup>2</sup> but others, with the better reason, hold that even though the public own the fee, a street can not be transformed into a railroad.<sup>3</sup> A railroad company acquires an absolute right to the possession and use of its track, except at public crossings, and persons going upon it may sometimes be deemed trespassers, and this surely operates to deprive abutting owners of a valuable right, that of free means of ingress and egress to their property. An owner buying and improving property upon a public street has, upon the plainest principles of natural justice, a right to expect that it shall be maintained as such, and not put to a use which will strip it in a great measure of its public character, and make its use hazardous and inconvenient. It can not be justly held that property appropriated to a public street is in the contemplation of the land owner or the public to be afterwards diverted to the use of a private corporation owning a railroad, nor are damages assessed upon any such a basis. It is easy to see that a street would materially add to the value of adjoining property, while the construction and operation of a steam railway might

<sup>1</sup> *Stanley v. City*, 54 Ia. 463, S. C. 37 Am. Rep. 216; *Terre Haute, etc., Co. v. Scott*, 74 Ind. 29; *Terre Haute, etc., Co. v. Rodell*, 89 Ind. 128; *Ramsden v. Manchester, etc., Co.*, 11 Exch. 723; *Williams v. N. Y. Central R. R.*, 16 N. Y. 97; *Inlay v. Union Branch R. R. Co.*, 26 Conn. 249; *Inhabitants v. Connecticut, etc., Co.*, 4 Cush. 63; *Sherman v. Milwaukee*, 40 Wis. 645; *Carli v. Stillwater, etc., Co.*, 28 Minn. 373, S. C. 41 Am. Rep. 290; *Savannah, etc., Co. v. Mayor*, 45 Ga. 602; *Ford v. Chicago, etc., Co.*, 14 Wis. 609; *Starr v. Camden, etc., Co.*, 24 N. J. 492; *Cooley v. Const. Lim.* 546 *et seq.*; 2 Dillon, section 557. *Contra*, *Lexington, etc., Co.*

*v. Applegate*, 8 Dana, 289; *Com. v. Erie, etc., Co.*, 27 Pa. St. 339.

<sup>2</sup> *Atchison, Nebraska, etc., R. R. v. Garside*, 10 Kan. 532; *Grand Rapids, etc., Co. v. Heisel*, 38 Mich. 62, S. C. 31 Am. R. 306; *Harrison v. New Orleans, etc., Co.*, 34 La. Ann. 462, S. C. 44 Am. R. 438; 2 Dillon, section 556.

<sup>3</sup> *Story v. New York Elevated R. R.*, 90 N. Y. 116, S. C. 43 Am. R. 146; *Railroad Co. v. Schurmeier*, 7 Wall. 272; *Cooley Const. Lims.* 556, *n.*; *Railway Co. v. Lawrence*, 38 Ohio St. 41, S. C. 43 Am. Rep. 419. See *Barney v. Keokuk*, 94 U. S. 324.

greatly diminish it.<sup>1</sup> Land seized for the purpose of a public street can not be used for the purposes of a market house without compensation to the owner of the soil.<sup>2</sup> Constructing a ferry landing upon an existing highway imposes such an additional burden as entitles the owner of the soil to compensation.<sup>3</sup>

The title which the local authorities acquire in a street or road is in trust for the public, and they acquire this title, not for all purposes, but for one general purpose, that of a highway over which all citizens have a right to pass and repass at pleasure. This is the title which they are authorized to take, and this is the title which under every just principle of law the owner of the fee should be deemed to part with, and when the way is diverted to any other use, whether that of a wharf, a ferry landing, a railroad, or a canal, a burden is placed upon the land which neither the owner nor the public contemplated at the time of the original seizure. Where an easement or right in land is broadened, something is taken from the owner of the fee, and, on principle, where the thing taken possesses value it should be paid for. A privilege may often add very materially to the value of land, as the right to use a street for receiving and discharging goods, for going to and from one's house, and when that is destroyed there is a taking in the just sense of the constitutional provisions.

There may be changes in the use of a way which impair no privileges, and invade no rights. Changing an ordinary highway into a toll road is not adding such a burden as entitles the owner to compensation.<sup>4</sup> The use is not essentially changed,

<sup>1</sup> *People v. Kerr*, 27 N. Y. 188; *Kellinger v. Forty-Second St. R. R.*, 50 N. Y. 206; *Railroad Co. v. Schurmeier*, 7 Wall. 272; *Cox v. Louisville, etc., Co.*, 48 Ind. 178; *Crawford v. Delaware*, 7 Ohio St. 459; *Street R. W. v. Cumminsville*, 14 Ohio St. 523; *Proprietor Locks v. Nashua, etc., Co.*, 104 Mass. 1, S. C. 6 Am. Rep. 181.

<sup>2</sup> *State v. Laverack*, 34 N. J. 201; *State v. Mobile*, 5 Porter (Ala.), 279; *Savannah v. Wilson*, 49 Ga. 476.

<sup>3</sup> *Prosser v. Wapello Co.*, 18 Ia. 327; *Haight v. Keokuk*, 4 Ia. 199; *Lexington, etc., Co. v. McMurty*, 3 B. Monr. 516.

<sup>4</sup> *Carter v. Clark*, 89 Ind. 238; *Benedict v. Goit*, 3 Barb. 459; *Chagrin Falls Co. v. Crane*, 2 Ohio St. 419; *Com. v. Wilkinson*, 16 Pick. 175, S. C. 26 Am. Dec. 654; *Wright v. Carter*, 27 N. J. 76; *Douglass v. Turnpike Co.*, 22 Md. 219. Nor for toll road to free road. *Murray v. County Commissioners*, 12 Metc. 455; *Malone v. Toledo*, 28 Ohio St. 643. But see *Williams v. Natural Bridge, etc., Co.*, 21 Mo. 580, and *Cape Girardeau Road v. Renfro*, 58 Mo. 265, *contra* as to changing free road to turnpike.

for a toll road is open for the ordinary purposes of travel to all upon equal and common terms. It is true there is a change in the manner of maintaining the road, for when it becomes a toll road it is kept up by tolls, while during its existence as a road belonging to the public it was maintained by taxes imposed for that purpose. The two uses are not incompatible, as in the cases which we have discussed, for there remains a common right of use for which the road was originally laid out, and there is no increase in the hazards attendant upon the use, nor can one who uses it for the purpose for which it was designed become a trespasser, unless, indeed, he does commit some unauthorized or illegal act.

There is no taking unless there is an occupancy of the premises or a direct and permanent interference with a property right, and a mere temporary passage over the land for the purpose of making a preliminary survey will not constitute a taking in the constitutional sense.<sup>1</sup> There are many entries on land for which no action will lie. Thus county officers may pass over the land of a citizen for the purpose of ascertaining and locating a boundary; so, too, a sheriff may lawfully enter for the purpose of making an arrest.<sup>2</sup> An entry on ground for the purpose of constructing a road or street would, however, be unauthorized and illegal.<sup>3</sup> A temporary occupancy can not be justified without legislative authority, and not then unless compensation is duly made.<sup>4</sup> The rule permitting an entry for the purpose of making a preliminary survey, will not be extended to embrace acts done in constructing the way, nor will it authorize experiments upon the land for the purpose of ascertaining whether it is suitable for the use for which it is proposed to appropriate it.<sup>5</sup>

<sup>1</sup> Walther v. Warner, 25 Mo. 277; Polly v. Saratoga, 9 Barb. 449; State v. Seymour, 35 N. J. L. 47; Stewart v. Mayor, 7 Md. 500; Cushman v. Smith, 34 Me. 247; Bonaparte v. Camden, etc., Co., Bald. (C. C.) 209; Orr v. Quimby, 54 N. H. 590.

<sup>2</sup> Winslow v. Gifford, 6 Cush. 327.

<sup>3</sup> Davis v. San Lorenzo, etc., Co., 47 Cal. 517; California, etc., Co. v. Central, etc., Co., 47 Cal. 528; Winslow

v. Gifford, 6 Cush. 327; Landerbrun v. Duffy, 2 Pa. St. 398; St. Peter v. Denison, 58 N. Y. 416; Stewart v. Baltimore, 7 Md. 500; Eidemiller v. Wyandotte, 2 Dill. 376.

<sup>4</sup> People v. Third Avenue, 45 Barb. 63; Holcombe v. Moore, 4 Allen, 529.

<sup>5</sup> Morris v. Hudson R. R., 25 N. J. Eq. 384; Ash v. Cummings, 50 N. H. 591.

## CHAPTER IX.

### WHAT PROPERTY MAY BE TAKEN.

Property owned by the United States and used for a public purpose can not be seized by virtue of a State statute.<sup>1</sup> As it is now settled that the United States may condemn land when required by it for a public purpose,<sup>2</sup> it would seem to clearly result that a State can not condemn land for the United States.<sup>3</sup> It is doubtless within the authority of the law-making power of a State to empower a corporation to condemn land of which the State is the owner, but it ought not to be assumed in the absence of clear words authorizing a seizure of land owned and used by the State for a public purpose that the legislature intended to confer authority to appropriate such land. If the rule should be no stricter, it should, at least, be as strict as in cases where land already devoted to a public purpose is sought to be devoted to a new or additional use, and in such cases it is well settled that there can not be a second seizure unless the statute in express words or by very clear implication has authorized it. For this reason it can not, as we think, be justly held that a statute conferring in general terms authority to construct a high-

<sup>1</sup> *United States v. Chicago*, 7 How. (U. S.) 185. If the decision in *United States v. Railroad Bridge*, 6 McLean, 517, can be regarded as law, it would be within the power of a State to condemn land held by the United States as a private proprietor.

<sup>2</sup> *Kohl v. United States*, 91 U. S. 367. Compare *Pollard v. Hagan*, 3 How. (U. S.) 212.

<sup>3</sup> In *Trombley v. Humphrey*, 23 Mich. 471, S. C. 9 Am. R. 94, it was held that a State could not condemn land for the

use of the United States, but in *Reddall v. Bryan*, 14 Md. 444, and in *Burt v. Merchants, etc., Co.*, 106 Mass. 356, a different rule was asserted. Under the decision in *Pollard v. Hagan*, 3 How. (U. S.) 212, there was reason for holding the doctrine declared in Maryland and Massachusetts, but, since it has been settled that the United States may seize land under the power of eminent domain, it is quite clear that the seizure can not be made for it by a State.



way from one point to another grants authority to seize property of the State held for a public use.<sup>1</sup>

Private property of every kind, no matter by whom owned, may, as a rule, be seized when the public necessity demands it.<sup>2</sup> Land, timber, stone, gravel, water and water rights, may be appropriated for the public ways.<sup>3</sup> In short, there is no species of property, nor any kind of property rights, legal or equitable, which may not be seized under the right of eminent domain.<sup>4</sup> All property, and all rights in property, are held subject to this inherent attribute of sovereignty.

Franchises granted by the sovereign to private corporations or political subdivisions must yield to later and more urgent public necessities. The exercise of the power of eminent domain

<sup>1</sup>In the case of *The Indiana Central R. R. Co. v. The State*, 3 Ind. 421, a doctrine opposed to that of the text is asserted, but we do not believe that the decision can be sustained. It is contrary to the rule declared in the *Mayor of Atlanta v. The Central R. R. Co.*, 53 Ga. 120; *Matter of Ninth Ave.* 45 N. Y. 729; *St. Louis, etc., R. R. Co. v. Blind Institution*, 43 Ill. 303. Where the State holds as a mere proprietor, there is reason for a different rule. *Hobart v. Ford*, 6 Nev. 77; *Benson v. Mayor*, 10 Barb. 223. A State may authorize condemnation of land in the hand of its own grantee. *Brimmer v. Boston, etc., Co.*, 102 Mass. 19; *Philadelphia, etc., Co. v. Philadelphia*, 9 Phil. 563; *Jackson v. Winn's Heirs*, 4 Littell, 322; *Young v. McKenzie*, 3 Ga. 31; *Beekman v. Saratoga, etc., Co.*, 3 Paige 45.

<sup>2</sup>*Baily v. Miltenberger*, 31 Pa. St. 37; *People v. Mayor*, 32 Barb. 102; *U. S. v. Railroad Bridge Co.*, 6 McLean, 517; *Grintner v. Kansas, etc., Co.*, 23 Kan. 642; *Illinois Central R. R. v. U. S.*, 20 Law Rep. 630; *Union Pacific, etc., Co. v. Burlington, etc., Co.*, 3 Fed. Rep. 106; *U. S. v. Chicago*, 7 How. 189; *Ind., etc., Co. v. State*, 3 Ind. 421.

<sup>3</sup>*Wheelock v. Young*, 4 Wend. 647; *Bliss v. Hosmer*, 15 Ohio, 44; *Ferree v. School Dist.*, 76 Pa. St. 376; *Jerome v. Ross*, 7 Johns. Ch. 315, S. C. 11 Am. Dec. 484; *Strohecker v. Alabama R. Co.*, 42 Ga. 509; *Watkins v. Walker*, 18 Tex. 585. *In re N. Y. Central R. R.*, 77 N. Y. 248; *Arnold v. Hudson*, 55 N. Y. 661; *Galena, etc., Co. v. Halsam*, 73 Ill. 494; *Boston, etc., Co. v. Old Colony, etc., Co.*, 14 Allen, 444.

<sup>4</sup>*Kip v. N. Y., etc., Co.*, 67 N. Y. 227; *Prospect Park, etc., Co., In re*, 67 N. Y. 371; *Cobb v. Boston*, 109 Mass. 438; *North Pa. Co. v. Davis*, 26 Pa. St. 238; *Alabama, etc., Co. v. Kenney*, 39 Ala. 307; *Watson v. N. Y., etc., Co.*, 47 N. Y. 151; *East Tenn., etc., Co. v. Love*, 3 Head. 63; *Secombe v. R. R. Co.*, 23 Wall. 108.

<sup>5</sup>*Re Tonawanda Bridge Co.*, 91 Pa. St. 216; *New Orleans, etc., Co. v. Southern Telegraph Co.*, 53 Ala. 211; *Richmond v. Railroad Co.*, 13 How. 83; *Crosby v. Hanover*, 36 N. H. 420; *Fort Plain Co. v. Smith*, 30 N. Y. 44; *Philadelphia, etc., Co.'s Appeal*, 102 Pa. St. 123; *St. R. R. Co. v. West Side, etc., Co.*, 48 Mich. 433; *New Orleans, etc., Co. v. Southern, etc., Co.*, 53 Ala. 211, *Western Union, etc., Co. v. Am.*

does not violate or impair the obligation of contracts, and the grant of corporate franchises does not preclude the government from promoting the public welfare by authorizing the destruction of the granted franchises whenever the public necessity demands it.<sup>1</sup> The validity of the contract between the government and the corporation is recognized and protected in the provision made for compensation, for, if the corporation secures compensation for the right of which it is deprived, its contract rights are preserved just as are those of private citizens.<sup>2</sup> The franchise owned by a corporation is an incorporeal hereditament; it can not have rights more sacred than those of the citizen in his corporeal or incorporeal property, and there is no reason for making a distinction in favor of a corporate franchise.<sup>3</sup> It is, doubtless, more difficult to determine the value of a corporate franchise than to ascertain the value of corporeal property owned by an individual, but this furnishes no reason for claiming immunity from seizure.<sup>4</sup> In all cases there is difficulty in arriving at a just value of property, but the demands of the public can not be denied upon this ground. Although the franchise is only impaired and not entirely destroyed, there must be compensation, and the amount must be commensurate with the extent of the injury inflicted upon the corporation owning the franchise.<sup>5</sup> The entire franchise of the corporation

etc., 65 Ga. 160; White River Turnpike Co. v. Vt. Cent. R. R., 21 Vt. 590; Philadelphia, etc., Co. v. Philadelphia, 47 Pa. St. 325; Commonwealth v. Essex, 13 Gray, 247; Metropolitan City R. R. v. Chicago, 87 Ill. 317; New Castle, etc., Co. v. Peru, etc., R. R., 3 Ind. 464; Baltimore & H. Turnpike Co. v. Union R. R. Co., 35 Md. 224.

<sup>1</sup> Eastern, etc., Co. v. Boston R. R., 111 Mass. 125. Per Colt, J., S. C. 15 Am. Rep. 13; West River Bridge Co. v. Dix, 6 How. 507; Pomeroy Const. Law, 392; Raritan R. R. Co. v. Delaware, etc., 3 C. E. Green, 546.

<sup>2</sup> West River Co. v. Dix, 6 How. 507.

<sup>3</sup> Enfield Bridge Co. v. Hartford, 17 Conn. 40; Backus v. Lebanon, 11 N.

H. 19; Central Bridge Co. v. Lowell, 15 Gray, 106; New York, etc., Co. v. Boston R. R., 36 Conn. 196; James River Co. v. Thompson, 3 Gratt. 270; Tuckahoe Canal Co. v. Tuckahoe R. R., 11 Leigh. 42; Lafayette Plank Road Co. v. New Albany R. R., 13 Ind. 90; New Castle R. R. v. Peru R. R., 3 Ind. 464; Black v. Delaware, etc., Co., 24 N. J. Eq. 455.

<sup>4</sup> Central Bridge Co. v. Lowell, 15 Gray, 106.

<sup>5</sup> The State v. Noyes, 47 Me. 189; Enfield Bridge Co. v. Hartford Bridge Co., 17 Conn. 454; St. Louis, etc., Co. v. N. W., etc., Co., 69 Mo. 65; Boston, etc., Co. v. Salem, etc., Co., 2 Gray, 1; Power v. Village of Athens, 99 N. Y.

may be appropriated if the public necessity requires, thus, as was said in one case,<sup>1</sup> in speaking of the right to appropriate a railroad for the purpose of a county road, an existing way "may be taken from end to end if the public necessity requires." The public are not, however, bound to appropriate and pay for the entire corporate franchise; they need only take and pay for so much as may be required for the public way. It is not in the power of the corporation which owns the franchise to compel an appropriation of the entire corporate right, but it is entitled to compensation for all injury legitimately resulting from the appropriation.<sup>2</sup> It is to be observed that when it is said that the corporation whose franchises are impaired is entitled to compensation, something more is meant than a mere interference with its business by a rival invested with corporate franchises of a similar character. Where there is nothing more than a diminution of business caused by the grant of a franchise, there is no right to compensation, although the corporation first erected possesses a charter containing no reservation of a right to repeal or amend.<sup>3</sup> Thus a toll road can not prevent the construction of a free road running parallel with and near it, even though the effect may be to greatly diminish the receipts of tolls.<sup>4</sup> Regulating the use of a franchise under the police

592. Exclusive right to maintain a bridge is a franchise of value. *Piscataqua Bridge Co. v. N. H. Co.*, 7 N. H. 35. Where there is no taking the owner of the franchise can not have compensation, although there may be some consequential injury. *Moses v. Sanford*, 11 Lea. 731; *Richmond, etc., Co. v. Rogers*, 1 Duvall, 135; *Mills v. Comm'rs*, 3 Scam. 53; *Pittsburgh, etc., Co. v. Jones*, 111 Pa. St. 204.

<sup>1</sup> *Crossly v. O'Brien*, 24 Ind. 325.

<sup>2</sup> *Worcester R. R. v. Railroad Commissioners*, 118 Mass. 561; *Jersey City v. Jersey City R. R.*, 20 N. J. Eq. 61; *Metropolitan Co. v. Highland R. R.*, 118 Mass. 290.

<sup>3</sup> *Turnpike Co. v. State*, 3 Wall. 210; *State v. Noyes*, 47 Me. 189; *Franklin, etc., v. County Court*, 8 Humph. 342; *Bordentown, etc., Co. v. Camden, etc., Co.*, 17 N. J. L. 314.

<sup>4</sup> *The Com. v. Eastern R. R. Co.*, 103 Mass. 254, *Thorpe v. Rutland, etc., Co.*, 27 Vt. 140. A railroad company may be compelled to make wider and better bridges, and to make necessary embankments for new highways without compensation paid or tendered. *English v. New Haven, etc., Co.*, 32 Conn. 240; *Albany, etc., Co. v. Brownell*, 24 N. Y. 345, overruling *Miller v. New York, etc., Co.*, 21 Barb. 513.

power is not a taking within the meaning of the constitution.<sup>1</sup>

The authority to take property for public use is not restricted to property upon which the right has not been exercised, but it extends to property previously appropriated. Land which has been seized for one public purpose may be taken for another whenever the public necessity requires. A street may be laid upon a turnpike, or on a railroad, or a canal may be seized for that purpose.<sup>2</sup> The legislature has supreme power over the subject, limited only by the constitutional provisions, and when it exercises this authority, the presumption is that the former use has become less beneficial to the public, and that the necessity of the public demands the appropriation of the property to the new use.<sup>3</sup>

The right of eminent domain is a dominant legislative power only called into exercise by the enactment of a valid statute, and when a party asserts a right to seize land previously appropriated to a public use, he must sustain his claim by producing a statute clearly conferring the asserted authority. It will not be presumed, in the absence of such a statute, that the legislature intended to again seize property which had been once appropriated.<sup>4</sup> An act providing for the laying out of a

<sup>1</sup>Charles River Bridge Co. v. Warren Bridge Co., 11 Pet. (U. S.) 420. And see Sixth Avenue R. R. v. Kerr, 45 Barb. 138; Canyonville, etc., R. R. Co. v. Stephenson, 8 Ore. 263; Metropolitan R. R. Co. v. Highland R. R. Co., 118 Mass. 290. But where an exclusive franchise is clearly granted, the exclusive nature of the franchise constitutes property of value. Binghampton Bridge, 3 Wall. 51; Parrott v. Lawrence, 2 Dill. C. C. 332; Bridge Co. v. Hoboken Land Co., 1 Wall. 116; Bush v. Peru Bridge Co., 3 Ind. 21.

<sup>2</sup>Barber v. Andover, 8 N. H. 398; Peirce v. Somersworth, 10 N. H. 369; Armington v. Barnett, 15 Vt. 745. And see Grand Rapids, etc., R. R. Co. v. Grand Rapids, etc., R. R. Co., 35 Mich. 265, S. C. 24 Am. Rep. 545; Eastern R. R. Co. v.

Boston, etc., R. R. Co., 111 Mass. 125, S. C. 15 Am. Rep. 13; Evergreen Cemetery Asso. v. New Haven, 43 Conn. 234, S. C. 21 Am. Rep. 643.

<sup>3</sup>Miller v. Craig, 11 N. J. Eq. 175; Talbott v. Hudson, 16 Gray, 417.

<sup>4</sup>Lake Shore, etc., Co. v. N. Y., etc., Co., 8 Fed. Rep. 858; Matter of Ninth Avenue, 45 N. Y. 729; Manhattan Co., *Ex parte*, 22 Wend. 653; City of Buffalo, *In re*, 68 N. Y. 167; Boston Water Power Co. v. Boston, 23 Pick. 360; West Boston Bridge v. Middlesex, 10 Pick. 270; Bridgeport v. N. Y., etc., Co., 36 Conn. 255; Commissioners Central Park, 63 Barb. 282; Hickok v. Hine, 23 Ohio St. 523; Hatch v. Cincinnati R. R., 18 Ohio St. 92; State v. Noyes, 47 Me. 189; Worcester R. R., 118 Mass. 561; State v. Montclair R.

road or street, and the assessment of benefits and damages in favor of and against land owners will not authorize the appropriation of lands already used for public parks.<sup>1</sup> Nor will an act of such a character warrant the seizure of land previously appropriated for a turnpike.<sup>2</sup> A statute conferring the privilege of flowing private property does not, it has been held, confer a right to flow a public road,<sup>3</sup> nor will a general grant of authority to construct a turnpike warrant the seizure of a line of railroad.<sup>4</sup> The grant of authority to construct and maintain a reservoir for supplying the public with water will not authorize the occupancy of public streets for that purpose.<sup>5</sup> The rule of which we are speaking does not apply to property owned and held by a tenure and for a purpose similar to that by and for which private property is usually held, but it applies only to cases where the purpose for which the property is held is of a public nature.<sup>6</sup> The presumption against a general purpose to appropriate property previously appropriated to a public use is not confined to property actually used for the purpose for which it was taken, but it also extends to property that will be so used and over which some rights have been exercised. Thus, the presumption will extend to the location of a railroad, and a general authority to lay out streets will not authorize the mu-

R., 6 Vroom (N. J.), 328; New York, etc., Co., *In re*, 20 Hun. 201; West River Bridge Co. v. Dix, 6 How. 543; Packer v. Sunbury, 19 Pa. St. 211; Chesapeake, etc., Co. v. Baltimore, etc., Co., 4 Gill. & J. 1; Lake Shore, etc., Co. v. Cincinnati, etc., Co., 116 Ind. 578. A second taking of any kind of property, no matter by whom owned, may be authorized by the legislature, but there must be a clear grant of power to appropriate property previously appropriated. Rominger v. Simmons, 88 Ind. 453; Mobile, etc., Co. v. Alabama, etc., Co. (Ala.), 6 So. R. 404; Appeal of Sharon R. R. Co. (Pa.), 17 Atl. 234.

<sup>1</sup> Wellington Petitioner, 16 Pick. 87.

<sup>2</sup> West Boston Bridge v. Middlesex, 10 Pick. 270.

<sup>3</sup> Com. v. Stevens, 10 Pick. 247.

<sup>4</sup> Bridgeport v. N. Y. R. R., 36 Conn. 255.

<sup>5</sup> Manhattan Co., *Ex parte*, 22 Wend. 653; State v. Montclair R. R., 35 N. J. L. 328; Mayor, etc., v. Central R. R., 53 Ga. 120; St. Louis v. Blind Asylum, 43 Ill. 303.

<sup>6</sup> Rochester Water Works Co., *In re*, 66 N. Y. 413; Peoria v. P. & J. R. R., 66 Ill. 174; N. Y. Cent., etc., R. R. Co. v. Met. Gas Light Co., 63 N. Y. 326; North Carolina, etc., R. R. Co. v. Carolina Cent. R. R. Co., 83 N. C. 489.

municipal corporation to establish a street on the line located by the railroad company.<sup>1</sup>

It is not to be understood that the authority to seize the land previously appropriated to a public use must be conferred in express terms, for, if the statute can not be given effect without construing it to authorize such a seizure, and there are words necessarily implying the authority to make the appropriation, then it will be held to authorize the seizure.<sup>2</sup> The authority to take property seized and appropriated to another public use may be implied from the language of the statute, but this can only be so where the words employed and the evident intent of the statute make it clearly the duty of the courts to give force to the implication. The intent of the legislature to destroy the rights granted by former statutes must unequivocally appear. A grant of authority to appropriate land seized under former statutes, or previously seized for public use, can not be inferred from a mere general grant.<sup>3</sup>

A right to cross an existing public way with a street or road may often be implied where a right to longitudinally take the way would not be deemed to exist. Where authority is granted to construct a road or street from one point to another, there is impliedly conferred a right to cross canals, railroads, turnpikes, streets or roads, lying between the two points.<sup>4</sup> A grant of au-

<sup>1</sup> Albany Northern R. R. Co. v. Brownell, 24 N. Y. 345; City of Buffalo, *In re*, 68 N. Y. 167; Bridgeport v. N. Y., etc., 36 Conn. 255; Hannibal v. St. Jo R. R., 49 Mo. 480; Northern Central R. R. v. Baltimore, 46 Md. 425; Atlanta v. Central R. R. Co., 53 Ga. 120.

<sup>2</sup> Little Miami, etc., Co. v. Dayton, 23 Ohio St. 510; Chicago, etc., Co. v. Joliet, 79 Ill. 25; Morris, etc., Co. v. New-ark, 2 Stock. (N. J.) 352; Boston, etc., Co. v. Boston, 23 Pick. 360; Central City, etc., R. R. Co. v. Fort Clark, etc., Co., 81 Ill. 523; Penna. R. R. Co.'s Appeal, 3 Am. & Eng. R. R. Cas. 507.

<sup>3</sup> New Jersey v. Long Branch Commissioners, 39 N. J. L. 28, Matter of

City of Buffalo, 68 N. Y. 167; Springfield v. Conn. R. Co., 4 Cushing, 63; White River Turnpike Co. v. Vt. Central R. R., 21 Vt. 590; Enfield Bridge Co. v. Hartford, 17 Conn. 40; Central City, etc., Co. v. Ft. Clark, etc., Co., 81 Ill. 523. Contra Costa Co. v. Moss, 23 Cal. 323; Rex v. Pease, 4 B. & Ad. 30; Oregon Co. v. Bailly, 3 Oregon, 164.

<sup>4</sup> Tuckahoe Canal v. Tuckahoe R. R., 11 Leigh. 42; The State v. Easton R. R., 36 N. J. L. 181; Morris R. R. v. Central R. R., 31 N. J. L. 205; Baltimore, etc., Co. v. Union R. R., 35 Md. 224; New Castle R. R. v. Peru R. R., 3 Ind. 464, Little Miami, etc., Co. v. Dayton, 23 Ohio St. 510; St. Paul, etc., Co. v. Minneapolis, 35 Minn. 141,

thority, expressed in general terms, to seize lands and property for the purposes of a road or street will, in most cases, confer authority to construct the roads or streets across existing public ways, whether owned by the public, or by private corporations, but it will not confer authority to lay the road or street longitudinally upon the existing way. Where a statute grants authority to construct a street across a railroad track, the municipal corporation may construct it across the entire width of the right of way, and over switches, turn-outs and side tracks.<sup>1</sup> It is held in one case that such a provision would not confer authority to cross tracks used for the purpose of storing cars, but only to tracks used for the purposes of public traffic.<sup>2</sup> The broad doctrine declared in the case just referred to is not defensible on principle, for all corporations take subject to the inalienable right of eminent domain, and, thus taking, hold subject to the right of the sovereign to construct roads and streets across their property, and when it appears from the express words of the statute or by clear implication that the sovereign has granted a right to construct a road or street from one point to another, the corporation to whom this right is granted may cross all intervening tracks, if it be necessary to do so in order to construct the way between the points named.<sup>3</sup> The right to take longitudinally is essentially different from the right of crossing, and the rules governing the two classes of cases, as appears from the authorities we have referred to, are radically different.<sup>4</sup>

A private corporation which acquires a right to construct a turnpike or a railroad, acquires it subject to the dominant right of the State to cross its turnpike or railroad whenever the public necessity demands that new roads or streets shall be opened. In accepting a grant from the State, the private corporation impliedly agrees that the sovereign right to provide the citizens with necessary highways shall not be impaired.<sup>5</sup> The grant of

<sup>1</sup> Delaware, etc., Co. v. Village of Whitehall, 90 N. Y. 21, S. C. 10 Am. & Eng. R. R. Cases, 227; Boston, etc., Co. v. Trustees, 52 N. Y. 210.

<sup>2</sup> Albany, etc., Co. v. Brownell, 24 N. Y. 345.

<sup>3</sup> Illinois, etc., Co. v. Chicago, etc., Co., 3 Am. & Eng. R. W. Cases, 287.

<sup>4</sup> Lewis v. Germantown, etc., Co., 10 Phila. 608.

<sup>5</sup> Hannibal v. Hannibal, etc., Co., 49 Mo. 480; Enfield Bridge Co. v. Hart-

a right to construct a turnpike or a railroad does not take from the State the power to provide such highways as the public welfare requires. Of this the grantee of the State must take notice, as matter of law, and must be held to accept the grant upon the condition that the paramount right is not surrendered or impaired. This doctrine, as we believe, prevails only in favor of such ways as are public in the strict sense, and will not avail corporations owning turnpikes or railroads. The *rationale* of this doctrine is, that there is no taking where a public road or street crosses a turnpike or a railroad, inasmuch as the private corporation did not acquire any property except such as the statute granted, and the statute does not grant any property interest as against the paramount right of the public. The right which vests under the statute is limited and conditional, not absolute and unconditional, and the limitation which enters into the grant, and forms an essential part of it, is, that the public right shall be superior to the extent required by the public necessities. It is, indeed, far from clear, on principle, whether the legislature could, if it desired, surrender the sovereign power to provide the highways required by the public necessities; it can not, at all events, be inferred that it has either surrendered this power or embarrassed itself so that it can not justly and freely exercise it. There is little reason for presuming that the legislature meant to grant such franchises as would preclude the State from obtaining needed highways without paying for them, both to the owner of the fee and to its own grantee.

ford, 17 Conn. 40; New Orleans v. Little Miami, etc., Co. v. Dayton, 23 United States, 10 Peters, 662; Philadelphia Co. v. Philadelphia, 9 Phila. 563; Ohio St. 510.



## CHAPTER X.

### EXTENT OF THE TAKING.

The estate which may be seized under the right of eminent domain is such as the public purpose for which its seizure is authorized makes necessary. The right to take the property of a citizen is primarily founded upon necessity, and the estate which may be seized depends upon the public necessity.<sup>1</sup> The authorities, as we have seen, generally hold that the legislature may decide upon the existence of the necessity for the appropriation as well as upon the extent of the interest which may be seized. The legislature may, without submitting to judicial decision the question of the extent of the interest which shall be condemned, determine what estate shall be taken.<sup>2</sup> Where the statute declares what estate shall be taken, there can be no difficulty, for the legislative declaration controls, but where the question is submitted, as it may be,<sup>3</sup> to courts or juries for decision, perplexing questions often arise. It is competent for the legislature to deprive the owner of the entire estate, and vest an absolute fee in the corporation for whose benefit the appro-

<sup>1</sup> 2 Kent Com. 839, *n.*; Cooley Const. Lim. (5th ed.) 670; Mills Eminent Domain (1st ed.), section 11; Forney *v.* Fremont, etc., Co., 23 Neb. 465, S. C. 36 N. W. R. 806.

<sup>2</sup> People *v.* Smith, 21 N. Y. 595; U. S. *v.* Harris, 1 Sumner, 21; Prather *v.* The Western Union Tel. Co., 89 Ind. 501; Brooklyn Park Com. *v.* Armstrong, 45 N. Y. 234; De Varaigne *v.* Fox, 2 Blatch. C. C. 95; Co. Court *v.* Griswold, 58 Mo. 175; Dingley *v.* Boston, 100 Mass. 544; Wyoming Coal Co. *v.* Price, 81 Pa. St. 156. But where

this is not determined by the legislature, so much only as is necessary for the public use can be condemned. Private property can not be seized and part of it devoted to a private use. What is necessary for the public use must ordinarily be determined as a fact in each particular case. Embury *v.* Conner, 3 N. Y. 511.

<sup>3</sup> Rensselaer, etc., Co. *v.* Davis, 43 N. Y. 137; Matter of Central R. R. Co., 66 N. Y. 407; Power's Appeal, 29 Mich. 504; Lecoul *v.* Police Jury, 20 La Ann. 308.

priation is made.<sup>1</sup> It is held that where the State seizes lands for public works of an enduring and permanent character, constructed and owned by the State itself, the estate taken is a fee, and that where a fee is taken by the State it may be transmitted by conveyance to those to whom the canal, highway, or other public improvement is granted by the State.<sup>2</sup> This rule applies only where the nature of the public purpose for which the property is taken requires for its full enjoyment an estate in fee, or where the statute expressly authorizes the seizure of an estate of that magnitude. Where the fee is taken, whether by the State itself, or by some private or public corporation under authority from the State, the compensation should be for the value of that estate, and not for the value of a mere easement.

There has been much reluctance to yield to the doctrine of one of the cases,<sup>3</sup> which holds that the State usually takes a fee,

<sup>1</sup>Canal Co. v. Commissioners of Drainage, 26 La. Ann. 740; Peirce v. Commonwealth, 10 N. H. 369; Smith v. Conway, 17 N. H. 586; Ferree v. School Dist., 76 Pa. St. 376; Haldeman v. Pa. R. R., 50 Pa. St. 425; Cooleys Const. Lim. 692 (5th ed.); Metropolitan, etc., R. R. Co. v. Chicago, etc., R. R. Co., 87 Ill. 317; 2 Kent Com. 340 (3d ed.)

<sup>2</sup>Wyoming Co. v. Price, 81 Pa. St. 156; Haldeman v. Pa. R. R. Co., 14 Wright, 425; Craig v. Mayor, 3 P. F. Smith, 477; Robinson v. West, etc., Co., 22 P. F. Smith, 316; Malone v. Toledo, 34 Ohio St. 541; Dingley v. City of Boston, 100 Mass. 544; Heyward v. Mayor, 3 Seld. 314; Coster v. The N. J., etc., Co., 3 Zabriskie, 227; The Brookville, etc., Co. v. Butler, 91 Ind. 134; Cromie v. Board, 71 Ind. 208; Nelson v. Fleming, 56 Ind. 310; Water Works v. Burkhardt, 41 Ind. 364; Rexford v. Knight, 1 Kernan, 308.

<sup>3</sup>Water Works v. Burkhardt, 41 Ind. 364. It is, however, generally held that it is competent for the legislature to authorize the condemnation of the fee.

Challiss v. Atchison, etc., Co., 16 Kan. 117; Heyward v. New York, 7 N. Y. 314; Sweet v. Buffalo, 79 N. Y. 293; Dingley v. Boston, 100 Mass. 544; Raleigh, etc., Co. v. Davis, 2 Dev. & B. L. (N. C.) 451; De Varaigne v. Fox, 2 Blatch. 95; Prather v. Western Union Tel. Co., 89 Ind. 501; Patterson v. Boom Co., 3 Dill. 465; Malone v. Toledo, 28 Ohio St. 643. Where the statute does not authorize the seizure of the fee it can not be taken, unless a less estate will not be sufficient for the necessity which requires the seizure. Clark v. Worcester, 125 Mass. 226; Washington, etc., Co. v. Prospect Park, etc., Co., 68 N. Y. 591; Board v. Beckwith, 10 Kansas, 603; Henry v. Dubuque, etc., Co., 2 Iowa, 288. In Kellogg v. Malin, 50 Mo. 496, it was held, and, as we think, with strong reason, that although the statute in terms granted a right to seize a fee, still the fee is a base or terminable one expiring with the use for which the property was taken. As the construction of statutes authorizing the condemnation of property is strict, clear words are required to confer a right to con-

for the reason that the statute upon which it is based when fairly construed provides compensation for an easement and not for an estate in fee, and the court by which it was decided has been much divided in opinion.<sup>1</sup> There are strongly reasoned cases holding that in no event can the legislature authorize the taking of a greater estate than that which is necessary for the public use, and that when an easement is sufficient, no greater estate can be appropriated.<sup>2</sup> Unless the purpose for which the taking of the land is authorized is in itself such as requires that a fee should be seized, or the statute plainly authorizes that such an estate may be seized, then no more than an easement can be appropriated. This conclusion is founded on sound reason, and receives full support from the adjudged cases.<sup>3</sup>

It has been argued by many judges, and with much reason, that the right of the public, or of the corporation, should terminate when the land ceases to be required for the purpose for which it was appropriated, and that there should be no right to convey the property to private persons for private use. There is force in this position, for, in allowing the property to be thus conveyed, an end is attained by indirection which could not be directly reached, in this, that property thus conveyed is ultimately taken for a private purpose. That the property can not be taken for a private purpose all agree,<sup>4</sup> and yet, holding

demn the fee. *New Jersey, etc., Co. v. Morris*, 44 N. J. Eq. 398; *Quimby v. Vermont, etc., Co.*, 23 Vt. 387; *Dunham v. Williams*, 36 Barb. 136. But there are cases which declare a different doctrine. *Page v. O'Toole*, 144 Mass. 303.

<sup>1</sup>*Edgerton v. Huff*, 26 Ind. 35; *State v. Pottmyer*, 33 Ind. 402. See dissenting opinion in *Nelson v. Fleming*, 56 Ind. 310, p. 322; and opinion of Biddle, Niblack and Scott, J. J., in *Cromie v. Board*, 71 Ind. 208; *City of Logansport v. Shirk*, 88 Ind. 563; *Brookville, etc., Co. v. Butler*, 91 Ind. 134.

<sup>2</sup>In *Matter of Albany St.*, 11 Wend. 149; In *Matter of John St.*, 19 Wend. 659; *Quimby v. Vermont Central R. R.*,

23 Vt. 387; *Henry v. Dubuque R. R.*, 2 Iowa, 288; *New Orleans, etc., Co. v. Gay*, 32 La. Ann. 471.

<sup>3</sup>*Barclay v. Howells Lessees*, 6 Peters, 498, *Rust v. Lowe*, 6 Mass. 90; *Jackson v. Rutland, etc., Co.*, 25 Vt. 150, *Jackson v. Hathway*, 15 Johns. 447; *State v. Rives*, 5 Ired. (N. C.) 297; *Pittsburgh, etc., R. R. Co. v. Bruce*, 10 Am. & Eng. R. R. Cas. 1.

<sup>4</sup>*Mikesall v. Durkee*, 34 Kan. 509; *Oregon R. R. Co. v. Oregon, etc., Co.*, 10 Ore. 444; *Fleming v. Hull*, 73 Ia. 598, *S. C. 35 N. W. R.* 673; *Kyle v. Texas, etc., Co.*, 4 Lawyers R. Ann. 275; *Pittsburgh, etc., v. Benwood Iron Works, W. Va.*, 8 S. E. R. 453; *Vally v. Salt Co.*, 7 W. Va. 191; *McCandless's*

that the title extends beyond the public use, does, at the last, subject the property of one person to the private use and benefit of another. The weight of authority, however, is at present decidedly in favor of the power to authorize the seizure of the fee, and this leads to the conclusion that the taker acquires an absolute right of disposition.

The general rule, as we have said, is that statutes conferring authority to compel an owner to yield his property to the public demand are to be strictly construed, and this rule governs as to the extent of the estate which may be seized. Thus, a statute conferring authority to lay out a road imports that an easement only can be appropriated.<sup>1</sup> So, a statute providing that the corporation shall be seized and possessed, does not authorize the seizure of the fee.<sup>2</sup> Authority to take for an avenue does not confer a right to take a fee, but it does confer a right to acquire a perpetual easement.<sup>3</sup> The principle to be deduced from all the decisions may be thus stated: Where the language of the statute will bear a construction which will leave the fee in the land owner, that construction will be preferred rather than one which will wrest the fee from him.<sup>4</sup>

Appeal, 70 Pa. St. 210; *Embury v. Conner*, 3 N. Y. 511; *Matter of Eureka, etc., Co.*, 96 N. Y. 42; *Robinson v. Swope*, 12 Bush. 21; *Talbott v. Hudson*, 16 Gray, 417; *Jenal v. Green Island, etc., Co.*, 12 Neb. 163; *Brown v. Beatty*, 34 Miss. 227; *Harding v. Funk*, 8 Kan. 315.

<sup>1</sup> *United States v. Harris*, 1 Sumner, 21; *Dunham v. Williams*, 36 Barb. 136. It is held that where land is appropriated for a public park the use is continuous and inconsistent with the existence of any private interest in it, and that the city takes a fee, although there are no express words conferring it. *Holt v. Somerville*, 127 Mass. 408. The same general rule has been applied in the case of an alms house. *De Varaigne v. Fox*, 2 Blatchf. 95. See, also, *Tift v. Buffalo*, 82 N. Y. 204; *State v. Rives*, 5 Iredell, 297. In some of the

cases it is held that if it is provided that full value shall be paid for the land the implication is that the fee passed. *Brooklyn Park v. Armstrong*, 45 N. Y. 234. Where benefits are allowed to be considered, the just inference is that the fee does not pass. *Kellogg v. Mallin*, 50 Mo. 496.

<sup>2</sup> *Quimby v. Vermont Central R. R.*, 23 Vt. 387.

<sup>3</sup> *Washington Cemetery v. Prospect Park R. R.*, 68 N. Y. 591.

<sup>4</sup> *New York, etc., Co. v. Kip*, 46 N. Y. 546; *Heyneman v. Blake*, 19 Cal. 579. In determining what construction shall be placed upon the statute, the court may consider the nature of the use, the provision as to whether benefits are to be considered, and like matters, for from such matters it may be inferred that it was intended that a fee should pass.

Where part only of a lot of land is needed for a road or street no more can be taken. There can be no valid seizure of a strip of land lying along a highway, under a statute authorizing the condemnation of lands for highway purposes, unless the land is needed for the highway itself, or for some purpose legitimately connected with the use and enjoyment of the way, and within the scope of the statutory grant of authority to condemn.<sup>1</sup>

The adjudged cases are in substantial agreement upon the proposition that the person or corporation having a right to condemn land by virtue of the power of eminent domain must take the estate and the quantity prescribed by the statute. There is some conflict as to what construction shall be given the statutes, but there is no material diversity of opinion upon the proposition stated. It is incumbent upon the person or corporation asserting a right to condemn property, to take and to pay for the estate or the quantity which the statute prescribes. The rule upon this subject is a strict one, and the courts will permit no substantial departure from it.<sup>2</sup> Where, however, the statute does not definitely declare what estate or what quantity of property shall be taken, so much as is reasonably necessary for the public use may be condemned.<sup>3</sup>

Where nothing but the right to use the land is acquired, the owner of the fee retains a right to make such use of the land as

<sup>1</sup> *Buckingham v. Smith*, 10 Ohio, 288; *The Baltimore, etc., Co. v. P. W. & Co.*, 17 W. Va. 812; *Embury v. Conner*, 3 N. Y. 511; *Matter of Albany St.*, 11 Wend. 151, S. C. 25 Am. Dec. 618; *Dunn v. Charlestown, Harper (S. C.)*, 189; *Paul v. Detroit*, 32 Mich. 108.

<sup>2</sup> *Watson v. Acquackanonk, etc.*, 36 N. J. L. 195; *De Camp v. Ilibernia, etc., Co.*, 47 N. J. L. 43; *Matter of Union Ferry Co.*, 98 N. Y. 139; *Hingham, etc., Co. v. County of Norfolk*, 6 Allen, 353; *Pittsburgh National Bank v. Shoenberger*, 111 Pa. St. 95; *County of Ramsey v. Stees*, 28 Minn. 326; *Chesapeake, etc., Co. v. Mason*, 4 Cranch, 123; *Lessee, etc., Co. v. Cincin-*

*nati Turnpike Co.*, 11 Ohio, 392; *Stark v. Sioux City, etc., Co.*, 43 Iowa, 501; *Central R. R. v. Hudson, etc., Co.*, 46 N. J. Law, 289, *Road Case*, 4 W. & S. 39; *Brown v. Corey*, 43 Pa. St. 495; *Currier v. Marietta, etc., Co.*, 11 Ohio St. 222; *Matter of Water Comm'rs*, 96 N. Y. 351; *Pinchin v. London, etc., Co.*, 24 L. J. N. S. Ch. Div. 417; *Roanoke City v. Berkowitz*, 80 Va. 616.

<sup>3</sup> *Johnston v. Chicago, etc., Co.*, 58 Iowa, 537; *Lockie v. Mutual, etc., Co.*, 103 Ill. 401; *Ladd v. Madon, etc., Co.*, 6 Exch. 143; *Lodge v. Philadelphia, etc., Co.*, 8 Phila. 345; *Matter of Staten Island, etc., Co.*, 103 N. Y. 251.

is not inconsistent with the easement acquired by the corporation. Nothing can be done by him that will make the use of the way inconvenient or unsafe, nor can he do anything that will disturb the public in the free use of the way, but, subject to the superior right of the public, the owner is entitled to the use of the way and to all the profits that accrue from it.<sup>1</sup>

There is much diversity of opinion upon the question whether the power of eminent domain is exhausted by its exercise in a single instance. Some of the cases hold that all that is required must be taken at once, and that property owners can not be harassed by repeated seizures.<sup>2</sup> Other cases hold that one assertion of the power does not exhaust it.<sup>3</sup> It seems to us, although the question is by no means free from difficulty, that where the right is given by a general statute, it should be considered a continuing one. If a change is made in the plan of the improvement there must be a second assessment.<sup>4</sup>

<sup>1</sup>*Goodtitle v. Alker*, 1 Burr. 133; *Bean v. Colman*, 44 N. H. 539; *O'Linda v. Lothrop*, 21 Pick. 292; *Baker v. Frick*, 45 Md. 337, S. C. 24 Am. Rep. 506; *Emans v. Turnhill*, 3 Am. Dec. 427, *u*; *Maxwell v. McAtee*, 9 B. Monr. 20; *Mason v. Hill*, 5 B. & Ad. 1; *The Brookville, etc., Co. v. Butler*, 91 Ind. 134; *Julien v. Woodsmall*, 82 Ind. 568; *Ham v. Salem*, 100 Mass. 350; *Paine v. Woods*, 108 Mass. 160. It is in accordance with this general doctrine that it is held that ice which forms on a mill pond belongs to the owner of the fee. *State v. Pottmeyer*, 33 Ind. 402; *Washington Ice Co. v. Shortall*, 101 Ill. 46, S. C. 40 Am. Rep. 196; *Dodge v. Berry*, 26 Hun. 246; *Village of Brooklyn v. Smith*, 104 Ill. 429, S. C. 44 Am. Rep. 90; *Julien v. Woodsmall*, *supra*.

<sup>2</sup>*Mason v. Brooklyn, etc., Co.*, 35 Barb. 373; *Hudson Canal Co. v. New York, etc., Co.*, 9 Paige, 323; *Kenton*

*County Court v. Turnpike Co.*, 10 Bush. 529; *Brigham v. Agricultural, etc., Co.*, 1 Allen, 316; *Morris v. Central, etc., Co.*, 31 N. J. L. 205.

<sup>3</sup>*Mississippi, etc., Co. v. Devaney*, 42 Miss. 555; *Virginia, etc., Co. v. Lovejoy*, 8 Nev. 100; *Chicago, etc., Co. v. Wilson*, 17 Ill. 123; *Central Branch, etc., Co. v. Atchison*, 26 Kansas, 669; *Fisher v. Chicago, etc., Co.*, 104 Ill. 323; *Hamilton v. Annapolis, etc., Co.*, 1 Md. 553; *South Carolina, Ex parte*, 2 Rich. Law, 434; *Toledo, etc., v. Daniels*, 16 Ohio St. 390; *Peck v. Louisville, etc., Co.*, 101 Ind. 366.

<sup>4</sup>*Wabash, etc., Co. v. McDougall*, 126 Ill. 111, S. C. 9 Am. St. R. 539. In the case cited it is held that the measure of damages caused by a change in the plan is the increased injury to the property which results from the alteration of the plan.

## CHAPTER XI.

### COMPENSATION.

It is evident that the law upon the subject of compensation has undergone a gradual change, and that the better thought of the courts and the jurists now supports the doctrine that without compensation there can not be "due process of law." We do not believe that the failure to provide compensation invalidates a statute upon the ground that it is opposed to natural justice, as some of the earlier cases hold.<sup>1</sup> Our conclusion is that without a special provision in the constitution prohibiting the seizure of property without compensation the citizen is entitled to compensation under the general provisions which secure the right to hold and enjoy property. The people, in delegating part of their power (for they are the source of all power and their representative possesses only such authority as the people have delegated), did not invest any representative with authority to take away any of the essential elements of liberty, and the right to property is an essential element of liberty. The utmost that can be said is that the law-making power has a right to compel the citizen to sell his property, and a sale, of course, implies compensation on the part of the buyer.<sup>2</sup> But as all of the State constitutions, with one exception, now prohibit the seizure of private property without compensation, the question is one of less difficulty and importance than it once was, although it is still of some importance, since, as we believe, the Federal constitution<sup>3</sup> requires compensation in order to constitute "due process of law."

<sup>1</sup>Bradshaw v. Rogers, 20 Johns. 103; v. Justices, 9 Ga. 341; Matter of Highways, 22 N. J. L. 293.

Ch. 248; Martin, *Ex parte*, 13 Ark. 198;

<sup>2</sup>Cooley's Blackst., Book I, p. 137.

Cairo, etc., Co. v. Turner, 31 Ark. 494;

<sup>3</sup>Federal Constitution, Fourteenth

Carr v. Georgia, etc., Co., 1 Ga. 524; Amendment.

Young v. McKenzie, 3 Ga. 31; Parham

We regard compensation for private property taken for a public use as a right springing from that of personal liberty inherent in every citizen under a republican form of government, and to all of the States such a government is guaranteed.<sup>1</sup> By the Fourteenth Amendment the States are forbidden to deprive any citizen "of life, liberty or property without due process of law, or to deny to any person within its jurisdiction the equal protection of the laws." If the right to property is an element of liberty, it is a right which only the law, in due course, can take or abridge, and no law can be valid which assumes to take a person's property without yielding fair compensation, since without compensation there is not "due process of law," for so it was held when the constitution was amended, and constitutional provisions are construed with respect to society as it was organized and existed at the time the constitution was framed.<sup>2</sup> The Federal courts, in the later decisions, assert the doctrine which we have outlined, and assume jurisdiction under the Fourteenth Amendment, over many questions which were formerly held to be purely for the State courts.<sup>3</sup>

That private property can not be taken for a public use without paying or securing to the owner just compensation, we think is now settled beyond debate. It would be more consistent with sound principle to require payment before seizure, but there are cases holding that if payment is secured there is a sufficient compliance with the requirements of the constitu-

<sup>1</sup> Federal Const., Art. IV, section 4.

<sup>2</sup> *Durham v. State*, 117 Ind. 477; *The State, ex rel., v. Noble et al.*, 118 Ind. 350, 361; *Cooley's Const. Lim.* (5th ed.) 73. "Written constitutions," said Daniel Webster, "sanctify and confirm great principles, but the latter are in existence prior to the former."

<sup>3</sup> *Davidson v. New Orleans*, 96 U. S. 102; *Kentucky Railroad Tax Cases*, 115 U. S. 331; *Kennard v. Louisiana*, 92 U. S. 482; *McMillen v. Anderson*, 95 U. S. 40; *Scott v. City of Toledo*, 36 Fed. R. 385; *County of Santa Clara v.*

*Railroad Co.*, 18 Fed. R. 410. "Due process of law," said Mr. Justice Miller, in *Davidson v. New Orleans*, "is equally wanting in both cases; in the latter case, because such a taking, without making compensation to the owner, is nothing short of legalized robbery or confiscation for the benefit of the public." In the same case Mr. Justice Bradley said, of taking without compensation, that, "I think it would be depriving a man of his property without due process of law."



tion. It is sometimes said that the right of eminent domain is in effect "nothing more than a power to oblige the citizen to sell and convey when the public necessities require it,"<sup>1</sup> and if this be true, it should also be true that the compensation should not only be secured, but should be paid or tendered, for it seems unreasonable to compel a land owner to sell without receiving money or its real equivalent. Chancellor Kent has said with great force that: "The settled and fundamental doctrine is, that government has no right to take private property without giving just compensation; and it seems to be necessarily implied that indemnity should, in cases which will admit of it, be previously and equitably ascertained, and be ready for reception concurrently in point of time with the actual exercise of the right of eminent domain."<sup>2</sup> It is, perhaps, too much to say that this doctrine is fully sustained by the adjudged cases, but the legislature has been in the majority of cases careful to establish a rule in harmony with it, though there are cases in which it has been widely departed from.<sup>3</sup>

Although it is not uniformly held that compensation should always precede the appropriation, yet it is almost universally held that compensation must be so certainly provided that the owner can secure it by the aid of the courts without unnecessary or unreasonable delay.<sup>4</sup> It seems to us, on principle, that in no case should the owner be required to resort to legal pro-

<sup>1</sup> *Fletcher v. Peck*, 6 Cranch, 87; *People v. Mayor*, 4 N. Y. 419; *Carson v. Coleman*, 11 N. J. Eq. 106; *Young v. Harrison*, 6 Ga. 130; *Curran v. Shattuck*, 24 Cal. 427; *State v. Graves*, 19 Md. 351.

<sup>2</sup> 2 Kent Com. 339, *n*.

<sup>3</sup> *State v. Lytle*, 100 N. C. 497, S. C. 6 N. E. R. 379; *Lindsay v. Comm'rs*, 2 Bay. (So. C.) 38; *The Central Canal Co. v. Hetfield*, 25 N. J. L. 206; *Den v. Morris Canal Co.*, 24 N. J. L. 587; *State v. Dawson*, 3 Hill (So. C.), 101; *Raleigh v. Gaston, etc., Co.*, 2 Dev. & B. N. C. 451. In our opinion these cases are unsound. Even where there is no express constitutional provision

prohibiting the seizure of private property without compensation, there is a right to compensation under the general provisions which secure to the citizen the right to hold and enjoy property.

<sup>4</sup> *Long v. Fuller*, 68 Pa. St. 170; *Bloodgood v. Mohawk*, 18 Wend. 9; *Calking v. Baldwin*, 4 Wend. 667; *Taylor v. Marcy*, 25 Ill. 426; *Callison v. Hedrick*, 15 Gratt. 244; *Jackson v. Winn*, 4 Litt. 323; *Gardner v. Newburg*, 2 Johns. Ch. 162, S. C. 7 Am. Dec. 162; *Haverhill Bridge Proprietors v. County*, 103 Mass. 120, S. C. 4 Am. Rep. 518; *Langford v. Commissioner*, 16 Minn. 375.

ceedings to secure pay for property which the law compels him to part with for the public good, but that payment in money, or what is in fact the equivalent of money, should be a condition precedent to the right to appropriate the property. In many of the States this right is expressly secured to the owner, in cases where the seizure is by a private corporation, and is, as we think, really within the spirit of the national constitution as well as within the spirit of the provisions found in the constitutions of nearly all of the States.<sup>1</sup>

Where the constitution of the State permits the seizure of property without the concurrent payment of compensation, the security provided must be certain, adequate and safe. The provision securing compensation, and providing for its assessment and payment, should be contained in the statute authorizing the appropriation, otherwise, as has been justly said, it should be regarded "as no better than so much blank paper."<sup>2</sup> There are cases asserting a different doctrine, but they can not be sustained on principle or authority.<sup>3</sup> In such cases, the infirmity is in the statute itself, and it is not for the courts to attempt to heal it by usurping legislative functions; the true course is to keep within the judicial sphere, and pronounce such statutes unconstitutional. The right of eminent domain, as all agree, can only be exercised by the legislature in conformity to the constitution, and therefore the attempt of any other department of government to exercise it is a usurpation, and the attempt of the legislature to exercise it in any other mode than that provided by the constitution is futile. The authorities, when fairly construed, will be found to sustain the doctrine that

<sup>1</sup> *Cook v. South Park Comm'rs*, 61 Ill. 115.

<sup>2</sup> *Per Court in Long v. Fuller*, 68 Pa. St. 170; *State v. City of Perth Amboy*, N. J., 18 Atl. Rep. 671; *Gaines v. Comm'rs*, 37 N. J. L. 12.

<sup>3</sup> *Jerome v. Ross*, 7 Johns. Ch. 315, S. C. 11 Am. Dec. 484; *Rogers v. Bradshaw*, 20 Johns. 735; *Bonaparte v. Camden and Amboy R. R.*, Baldwin, 205, 226. Some of the courts declare that statutes which make no provision

for the payment of compensation are void, and this we think the sound doctrine. *People v. Loew*, 39 Hun. 490, S. C. 102 N. Y. 471; *Tuckahoe Canal Co. v. Tuckahoe R. R. Co.*, 11 Leigh. 42; *Wheelock v. Young*, 4 Wend. 647. Whether such statutes are or are not absolutely void is questionable, but it is quite clear that they can not be carried into effect without additional legislation. *Watson v. Trustees*, 21 Ohio St. 667.

the statute must contain the provision for compensation, and that courts can not supply the omission.<sup>1</sup>

The provision for securing compensation to the property owner must not, in any event, be dependent upon "any hazard, contingency, or casualty,"<sup>2</sup> but there must be a sure and adequate fund provided to which the owner may resort. It is held, even by the courts asserting the most liberal rule in favor of the party seizing property, that it is not enough that an action at law is given to the owner for the value of the land seized; something more effective, speedy and certain than an ordinary judgment at law must be provided.<sup>3</sup> The land owner can not be made to depend upon the contingency of the collection of a special assessment provided by statute.<sup>4</sup> It has, however, been held that if bonds of the public corporation are issued for the purpose of providing a fund this ensures a sure and adequate fund and is a sufficient compliance with the constitution.<sup>5</sup> Our judgment is, that the doctrine of the case just stated should

<sup>1</sup> Conn. River Co. v. County, 127 Mass. 50, S. C. 34 Am. Rep. 338; Boston, etc., Co. v. Salem, etc., Co., 2 Gray, 1; Pearson v. Johnson, 54 Miss. 259; Thompson v. Grand Gulf R. R., 3 How. Miss. 240, S. C. 34 Am. Dec. 81; Thatcher v. Dartmouth Bridge Co., 18 Pick. 501; Ash v. Cummings, 50 N. H. 591; City of Chicago v. Barbican, 80 Ill. 482; Bensly v. Mountain Lake Co., 13 Cal. 318; Southwestern Co. v. Telegraph, 46 Ga. 43, S. C. 12 Am. Rep. 585; Watson v. Trustees, 21 Ohio St. 667; People v. Nearing, 27 N. Y. 306; Weaver v. Boom Co., 28 Minn. 534; Watkins v. Walker County, 18 Texas, 585; Gardner v. Newburgh, 2 Johns. Ch. 162, S. C. 7 Am. Dec. 162; Petition Mt. Washington Co., 35 N. H. 134; Ames v. Lake Sup., etc., Co., 21 Minn. 241; Sage v. City of Brooklyn, 89 N. Y. 189; Chapman v. Gates, 54 N. Y. 145; People, *Ex rel.*, v. Hayden, 6 Hill, 359; Carbon Coal Co. v. Drake, 26 Kan. 345; Trenton, etc., Co. v. Raff, 36 N. J.

L. 335; Martin, *Ex parte*, 13 Ark. 198; Curran v. Shattuck, 24 Cal. 427.

<sup>2</sup> Sage v. City Brooklyn, 89 N. Y. 189.

<sup>3</sup> Shepardson v. Milwaukee, etc., Co., 6 Wis. 605; Wallace v. Karlenowski, 19 Barb. 118; Walther v. Warner, 25 Mo. 277; Curran v. Shattuck, 24 Cal. 427; Memphis, etc., Co. v. Payne, 37 Miss. 700; Henry v. Dubuque, 10 Iowa, 540; Carr v. Georgia R. R. Co., 1 Ga. 524.

<sup>4</sup> Sage v. City of Brooklyn, 89 N. Y. 189; Chapman v. Gates, 54 N. Y. 140; Commissioners v. Durham, 43 Ill. 86; Lafayette v. Schultz, 44 Ind. 97.

<sup>5</sup> In the matter of Church, 92 N. Y. 1. Where the State itself pledges its faith for the payment of the compensation, there is plausibility in the position that compensation is duly made. State v. Bruggerman, 31 Minn. 493; State v. Messenger, 27 Minn. 119. But even this is not entirely satisfactory, for it seems that the owner is in every instance entitled to payment in money.

not prevail, for the rights of the land owner ought not, as we believe, be required to depend upon the contingency of the validity and value of the municipal bonds. In all such securities there is almost always something of hazard, and where property is compulsorily taken no such element should ever be permitted to enter into the case. It is held, and with good reason, that title does not pass until the compensation has been paid.<sup>1</sup> An appeal bond, although properly conditioned and with sufficient surety, is not a payment, and will not, therefore, operate to pass title.<sup>2</sup> A judgment can not be deemed payment for the plain reason that there is not that certainty of its collection and enforcement which is essential to the existence of a sure and adequate fund.<sup>3</sup> In one case it was held that the rights of the land owner were not concluded by a judgment, although he had agreed that there should be no execution for two years, and that the judgment should draw interest at a greater rate than the law would have awarded in the absence of an agreement.<sup>4</sup> The case was placed upon the same footing as those in which a mere license is granted, and it was held that a revocable license to enter does not preclude the owner from afterwards insisting upon compensation.<sup>5</sup>

Where the State undertakes the payment of the compensation an adequate and sure provision is deemed to have been made.<sup>6</sup> A statute which provides for payment out of the earnings of a railroad owned by the State is, however, unconstitutional.<sup>7</sup> A distinction is declared to exist between cases in which the State irrevocably pledges its credit to the payment of the value of the owner's land, and those in which payment is made to depend upon a contingency. If the cases which hold that the pledge of the faith of a county, city or other public corporation is a

<sup>1</sup> *New Orleans v. Lagarde*, 10 La. Ann. 150; *Gillan v. Hutchinson*, 16 Cal. 153.

<sup>2</sup> *Ring v. Mississippi Bridge Co.*, 57 Mo. 496; *Sanborn v. Belden*, 51 Cal. 266.

<sup>3</sup> *Provolt v. Chicago, etc., Co.*, 57 Mo. 256; *Powers v. Armstrong*, 19 Ga. 427; *Thompson v. Grand Gulf*, 3 How. (Miss.) 240.

<sup>4</sup> *Irish v. Burlington, etc., Co.*, 44 Iowa, 380.

<sup>5</sup> *Selden v. D. & H. Canal Co.*, 29 N. Y. 634; *Eggleston v. N. Y. & H. R. R.*, 35 Barb. 162; *Foot v. N. H. R. R.*, 23 Conn. 214.

<sup>6</sup> *Tablott v. Hudson*, 16 Gray, 417.

<sup>7</sup> *Conn. River R. R. Co. v. Com'rs*, 127 Mass. 50, S. C. 34 Am. Rep. 338.

sufficient compliance with the constitution can be upheld at all, it must be upon the ground that the faith of the public of a political subdivision is inviolable and the means of payment certain and sufficient, and this in many instances is an assumption hardly warranted by historic facts, but, however this may be, there are cases declaring that an undertaking by a county or city is sufficient,<sup>1</sup> although this doctrine, we believe, should not prevail. Courts recognizing the principle that the pledge of the faith of a political corporation is sufficient, are, in most cases, careful to deny its application to private corporations, as railroads, canals, and the like,<sup>2</sup> but it seems difficult to perceive any solid reason for the distinction, for the rule prescribed by the paramount law should protect the citizen in the one case as effectually as in the other, and the only sure and consistent mode in which to do this is to require compensation to precede entry in all cases where the State itself does not pledge its faith for the payment of the compensation, and, indeed, it may well be doubted whether any exception to the general rule should be allowed.

The time when compensation must be paid or tendered depends in a great measure upon the constitutional provisions which govern the jurisdiction in which the question arises. It is not easy to formulate any general rule upon the subject, but it may be affirmed, as a general principle, that the compensation must be paid or tendered, in all cases where private corporations seek to appropriate the property, before the dominion over it is taken from the owner.<sup>3</sup> A distinction, as we have

<sup>1</sup> *Loweree v. Newark*, 9 Vroom, 151; *Yost's Rep.*, 17 Pa. St. 524; *Commissioners v. Bowie*, 34 Ala. 461.

<sup>2</sup> *Norton v. Peck*, 3 Wis. 714; *Shepardson v. R. R. Co.*, 6 Wis. 605; *Robbins v. R. R. Co.*, 6 Wis. 636; *Powers v. Bear*, 12 Wis. 213.

<sup>3</sup> *Jones v. New Orleans, etc., Co.*, 70 Ala. 227; *Bohlman v. Green Bay, etc., R. R. Co.*, 30 Wis. 105; *Powers v. Bears*, 12 Wis. 213, S. C. 78 Am. Dec. 733; *Southwestern R. R. Co. v. Southern and Atlantic Telegraph Co.*, 46 Ga.

43, S. C. 12 Am. Rep. 585; *Brown v. Powell*, 25 Pa. 229; *Ray v. Atchison R. R.*, 4 Neb. 439; *Henry v. Dubuque R. R. Co.*, 10 Ia. 540; *Cox v. Louisville R. R. Co.*, 48 Ind. 178; *Bensley v. Mountain Lake Water Co.*, 13 Cal. 306, S. C. 73 Am. Dec. 575, and note. It is quite certain under the recent decisions of the supreme court of the United States that no unjust or arbitrary provision respecting compensation, will be considered as "due process of law."

seen, is made in cases where the seizure is by the sovereign, and in jurisdictions where this principle prevails, the rule is that compensation need not be paid before the appropriation is actually made.<sup>1</sup> Mere preliminary surveys are not regarded as a taking, and it is, therefore, not necessary that the compensation should be paid or tendered before such surveys are made.<sup>2</sup> A tender after the taking will not, as a general rule, justify an entry previously made.<sup>3</sup> Injunction will lie to prevent a seizure where compensation has not been paid or tendered as the law requires,<sup>4</sup> and trespass<sup>5</sup> or ejectment<sup>6</sup> may be maintained where compensation has not been duly paid or tendered. Where there is an appraisal, and the amount thereof is paid into court, there is a valid tender.<sup>7</sup>

The compensation must be a pecuniary one.<sup>8</sup> Property can

<sup>1</sup> *State v. Dawson*, 3 Hill (S. C.), 100; *Orr v. Quimby*, 54 N. H. 590; *Dronberger v. Reed*, 11 Ind. 420; *Callison v. Hedrick*, 15 Grat. 244; *People v. Mich. So. R. R.*, 3 Mich. 496; *Cooley Const. Lim.* 560; *Rexford v. Knight*, 11 N. Y. 308; *Wheeler v. Essex Pub. Road*, 39 N. J. L. 291; *Rudisill v. State*, 40 Ind. 485; *Smeaton v. Martin*, 57 Wis. 374.

<sup>2</sup> *Cushman v. Smith*, 34 Me. 247; *Polly v. Saratoga, etc.*, R. R. Co., 9 Barb. 458; *Steuart v. Mayor, etc.*, 7 Md. 516; *Orr v. Quimby*, 54 N. H. 596; *Walther v. Warner*, 25 Mo. 289; *Fox v. W. P. R. R. Co.*, 31 Cal. 538; *Mercer v. McWilliams*, Wright, 132; *Chambers v. Cincinnati, etc.*, R. R. Co., 69 Ga. 320, S. C. 10 Am. & Eng. R. R. Cas. 376.

<sup>3</sup> *Bloodgood v. Mohawk, etc.*, R. R. Co., 18 Wend. 9, S. C. 31 Am. Dec. 313.

<sup>4</sup> *Evans v. Missouri, etc.*, R. W. Co., 64 Mo. 453; *Gardner v. Newburg*, 2 Johns. Ch. 162; *Sidener v. Norristown, etc.*, Turnp. Co., 23 Ind. 623; *Comm'r's v. Durham*, 43 Ill. 86; *High on Injunctions*, section 391.

<sup>5</sup> *Stacey v. Vermont Cent. R. R. Co.*, 27 Vt. 39; *Mahon v. N. Y. Cent. R. R.*

*Co.*, 24 N. Y. 658; *Peck v. Smith*, 1 Conn. 103; *Jones v. New Orleans, etc.*, R. R. Co., 70 Ala. 227; *Little Rock, etc.*, R. R. Co. *v. Dyer*, 35 Ark. 360; *Donald v. St. Louis, etc.*, R. R. Co., 52 Ia. 411.

<sup>6</sup> *Graham v. Columbus, etc.*, R. R. Co., 27 Ind. 260; *Lake Erie and Western R. R. Co. v. Kinsey*, 87 Ind. 514; *St. Joseph, etc.*, R. R. Co. *v. Callender*, 13 Kan. 496; *New Orleans, etc.*, Co. *v. Jones*, 68 Ala. 48. But where public policy forbids, neither injunction nor ejectment will lie. *Western, etc.*, Co. *v. Johnston*, 59 Pa. St. 290; *Harlow v. Marquette, etc.*, Co., 41 Mich. 336; *Midland, etc.*, Co. *v. Smith*, 113 Ind. 233.

<sup>7</sup> *Reisner v. Union Depot Co.*, 27 Kan. 382.

<sup>8</sup> *Central R. R. Co. v. Holler*, 7 Ohio St. 220; *Butler v. Sewer Comm'r's*, 39 N. J. L. 665; *Sanborn v. Belden*, 51 Cal. 266; *Fletcher v. Peck*, 6 Cranch, 145; *Commonwealth v. Peters*, 2 Mass. 125; *Hill v. Mohawk, etc.*, R. R. Co., 7 N. Y. 152; 2 *Dillon Munic. Corp.*, section 477; *Memphis v. Bolton*, 9 Heisk. 508; *Henry v. Dubuque, etc.*, R. R. Co., 2 Ia. 288; *State v. Beackmo*, 8 Blackf. 246.

not be made to pay the compensation to which the land owner is entitled, and in cases where benefits are not deemed a compensation, it must be paid in money.<sup>1</sup> There is a great diversity of opinion as to whether compensation for the land actually seized can be made by benefits accruing to the part remaining after the seizure, and as we shall hereafter see, there is also much conflict of opinion upon the whole subject of the award of benefits.

In cases where benefits are allowed at all, they should be restricted to such as are special and peculiar to the estate of the owner, and benefits to him, or to his estate, which are common to the public, should be excluded from consideration.<sup>2</sup> Benefits peculiar to the owner may, in a just sense, be said to constitute a compensation, because they add to the value of the property, and thus increase the owner's estate.<sup>3</sup> It is, however, plainly

<sup>1</sup>Carson v. Coleman, 3 Stock. 106, Sutton v. Louisville, 5 Dana, 28; Alabama, etc., R. R. Co. v. Burkett, 42 Ala. 83; Van Horne's Lessee v. Dorrance, 2 Dall. 304; State v. Beackmo, 8 Blackf. 246, and authorities in last note, *supra*.

<sup>2</sup>Wyandotte, etc., R. R. Co. v. Waldo, 70 Mo. 629; Comm'rs of Asheville v. Johnston, 71 N. C. 398; Roots Case, 77 Pa. St. 276; Dickinson v. Fitchburg, 13 Gray, 546; Carpenter v. Landaff, 42 N. H. 218; Vicksburg, etc., R. R. Co. v. Calderwood, 15 La. Ann. 481; Penrice v. Wallis, 37 Miss. 172; Meacham v. Fitchburg R. R. Co., 4 Cush. 291; Carli v. Stillwater, etc., R. R. Co., 16 Minn. 260; Lipes v. Hand, 104 Ind. 503; 2 Dillon's Municipal Corp. (3d ed.), section 624; State v. Mayor, 35 N. J. L. 157; Roberts v. Comm'rs, 21 Kan. 247; Springfield v. Schmook, 68 Mo. 394; Palmer Co. v. Ferrill, 17 Pick. 58.

<sup>3</sup>Holton v. Milwaukee, 31 Wis. 27; Greenville, etc., Co. v. Partlow, 5 Rich. L. 428. See Covington v. Worthington, 11 Ky. L. R. 141, S. C. 10 S. W. R. 790. On the general question of allowing

benefits to be deducted, there is little diversity of opinion; the great weight of authority sustains the text. Whitman v. Boston, etc., Co., 3 Allen, 133; Com. v. Middlesex, 9 Mass. 388, Livingston v. Mayor, 8 Wend. 85; Page v. Chicago, etc., Co., 70 Ill. 324; Putnam v. Douglass Co., 6 Ore. 328; Jackson County v. Waldo, 85 Mo. 637; Atlanta v. Green, 67 Ga. 386; Nichols v. Bridgeport, 23 Conn. 189; Livermore v. Jamaica, 23 Vt. 361. Some of the cases, however, limit the rule by holding that benefits can not be set off against the value of the land actually taken, but may be against the incidental damages to the part not actually seized. Shipley v. Baltimore, etc., Co., 34 Md. 336; Fremont, etc., Co. v. Whalen, 11 Neb. 585, Paducah, etc., Co. v. Stowall, 12 Heisk. 1, Mitchell v. Thornton. 21 Gratt. 164; James River, etc., Co. v. Turner, 9 Leigh. 313; Railroad Co. v. Foreman, 24 W. Va. 662; Washburn v. Milwaukee, etc., Co., 59 Wis. 364; Jones v. Willis Valley, 30 Ga. 43; Sutton's Heirs v. Louisville, 5 Dana, 28; New Orleans, etc., Co. v. Murrell, 36 La.

inequitable to make one whose property is seized pay for a benefit which all the public secures, but for which no member of it except himself is required to pay. Although there are cases holding that such general benefits may be considered, they are not grounded in sound principle nor well sustained by authority.

Remote or merely speculative benefits should not be taken into consideration in any case, but such only as are reasonably certain, and such as add to the value of the owner's estate or property, and not such as enure to him in common with the community at large.<sup>1</sup> It is not competent to take into account possible future benefits that may accrue from the increase of business, nor is it proper to take into account possible profits that the opening of the highway may bring to the owner of the land.<sup>2</sup> If the value of the land is increased, either by enhancing its worth in the market, or by adding to its rental value, then there is, clearly enough, a substantial and special benefit, which should be taken into account. So, if wet land is reclaimed and made arable by the opening of the way, there is a substantial benefit peculiar to the owner.<sup>3</sup> It is also held, that if the opening of the new highway discontinues an old one,

Ann. 344; *Buffalo, etc., Co. v. Terris*, 26 Texas, 588. But the current of judicial opinion is against such a limitation. *Trinity College v. Hartford*, 32 Conn. 452; *Trosper v. Comm'rs*, 27 Kan. 391; *Bangor and Piscataquis Co. v. McComb*, 60 Me. 290; *Farwell v. Cambridge*, 11 Gray, 413; *Newby v. Platte Co.*, 25 Mo. 258; *Carpenter v. Landaff*, 42 N. H. 218; *Pittsburgh, etc., Co. v. McCloskey*, 110 Pa. St. 436; *Alabama, etc., Co. v. Burkett*, 46 Ala. 569; *California, etc., Co. v. Armstrong*, 46 Cal. 85; *Ross v. Davis*, 97 Ind. 79; *Genet v. Brooklyn*, 99 N. Y. 296; *Bourgeois v. Mills*, 60 Texas, 96; *Winona v. St. Peter, etc., Co.*, 11 Minn. 515.

<sup>1</sup> *Hilbourne v. Suffolk*, 120 Mass. 393; *Trinity College v. Hartford*, 32 Conn. 452; *Hosher v. Kansas City R. R. Co.*, 60 Mo. 729; *Railroad Co. v. Tyree*, 7

W. Va. 693; *Old Colony R. R. Co. v. Plymouth*, 14 Gray, 155; *Green v. State*, 73 Cal. 94; *S. C. 14 Pac. R.* 680; *Lamb v. Reclamation District*, 73 Cal. 125; *S. C. 2 Am. St. R.* 775; *Trinity, etc., Co. v. Meadows (Texas)*, 11 S. W. R. 145; *Fairchild v. St. Louis*, 97 Mo. 85; *S. C. 11 S. W. R.* 60.

<sup>2</sup> *Brown v. Providence R. R. Co.*, 5 Gray, 35; *Shaw v. Charlestown*, 2 Gray, 107; *Minn. Cent. Co. v. McNamara*, 13 Minn. 508; *Minn. Valley Co. v. Doran*, 17 Minn. 188; *Dullea v. Taylor*, 35 Upper Can. Q. B. 395; *Watterson v. Allegheny, etc., Co.*, 74 Pa. St. 208; *Boston v. Middlesex, etc., Co.*, 1 Allen, 324.

<sup>3</sup> *Milwaukee, etc., Co. v. Eblee*, 4 Chandler, 72; *Paine v. Woods*, 108 Mass. 160; *Lipes v. Hand*, 104 Ind. 503.



and the owner regains his right in the land on which the latter was located, he obtains a benefit which must be taken into consideration.<sup>1</sup>

Although other persons upon the line of the highway may also be benefited by its opening, or by its being widened or otherwise improved, the benefit which the adjoining owner of one or more parcels of land receives from the opening of the highway is considered peculiar to him, and not one enjoyed by him in common with the general public.<sup>2</sup> A somewhat different view is taken by the New Hampshire court, but it is not well supported by principle or authority.<sup>3</sup> It seems clear that if a narrow alley should be widened to a broad street and connection thus be made with much traveled streets, the abutters on the alley would, in the increased value of their property, supposing, of course, that the widening of the alley does add to the value of the property, receive a benefit not common to the public, but peculiar to the owners of the lots abutting on the alley widened into a street. Other illustrations will readily occur in which it is very evident that the benefit to the abutter is a local and peculiar one, although the public also receive from the same public improvement substantial benefit.

The authorities upon the general subject of the allowance of benefits in cases where there is no constitutional or statutory provision excluding them from consideration, range themselves under these heads :

1st. Those holding that benefits can not in any case be set off against the injury sustained by the land owner.<sup>4</sup>

2d. Those holding that special benefits may not be set off

<sup>1</sup>Tingley v. Providence, 8 R. I. 493.

<sup>2</sup>Hilbourne v. Suffolk, 120 Mass. 393, Allen v. Charleston, 109 Mass. 243, Trinity College v. Hartford, 32 Conn. 452; Howard v. Providence, 6 R. I. 514; Cross v. Plymouth, 125 Mass. 557; Credit Valley Ry. Co. v. Spragge, 24 Grant Ch. (Upper Can.) 231.

<sup>3</sup>Whicher v. Benton, 50 N. H. 25.

<sup>4</sup>New Orleans, etc., R. R. Co. v. Mayo, 39 Miss. 374; Savannah v. Hart-ridge, 37 Ga. 113; Alabama, etc., R. R. Co. v. Burkett, 42 Ala. 83; Woodfolk v. Nashville, etc., R. R. Co., 2 Swan, 422; Isom v. Mississippi R. R. Co., 36 Miss. 300; Memphis v. Bolton, 9 Heisk. 508; Israel v. Jewett, 29 Ia. 475.

against the value of the land actually seized, but may be set off against incidental injuries sustained by the land owner.<sup>1</sup>

3d. Those holding that special benefits may be set off against the value of the land as well as against incidental injuries.<sup>2</sup>

It is within the power of the legislature to exclude benefits accruing to the owner from consideration, and a statute requiring estimates to be made irrespective of benefits will be given effect. But in giving effect to either constitutional or statutory provisions excluding benefits the courts generally hold that the provisions operate only to exclude benefits from being set off against the value of the property actually seized, and that they do not prevent benefits from being set off against incidental damages. If the owner gets in money the value of the land actually taken and is compensated for all incidental injuries by the benefits which accrue to the land not taken, he is, by these decisions, deemed to have received just compensation.<sup>3</sup>

Benefits accruing to other parcels of land than that out of which the appropriation is made can not be taken into consideration, but the benefits must be restricted to the lot or parcel

<sup>1</sup>Robbins *v.* Milwaukee, etc., Co., 6 Wis. 636; Mitchell *v.* Thornton, 21 Gratt. 164; Shipley *v.* Baltimore, etc., R. R. Co., 34 Md. 336; Raleigh, etc., R. R. Co. *v.* Wicker, 74 N. C. 220; Mayor *v.* Central R. R. Co., 53 Ga. 120; City Council of Augusta *v.* Marks, 50 Ga. 612; Wilson *v.* Rockford, etc., R. R. Co., 59 Ill. 273; Chapman *v.* Oshkosh, etc., R. R. Co., 33 Wis. 629; Wagner *v.* Gage Co., 3 Neb. 237; Buffalo Bayou, etc., R. R. Co. *v.* Ferris, 26 Tex. 588; Vicksburg, etc., R. R. Co. *v.* Calderwood, 15 La. Ann. 481; City of Paris *v.* Mason, 37 Tex. 447; Shawneetown *v.* Mason, 82 Ill. 337; Sutton *v.* Louisville, 5 Dana, 28; Henderson R. R. Co. *v.* Dickerson, 17 B. Mon. 173.

<sup>2</sup>M'Intire *v.* State, 5 Blackf. 384; Putnam *v.* Douglas County, 6 Ore. 328, S. C. 25 Am. Rep. 527; Hornstein *v.*

Atlantic R. R. Co., 51 Penn. St. 87; Root's Case, 77 Pa. St. 276; Com'rs of Pottawatomie Co. *v.* O'Sullivan, 17 Kan. 58; Livingston *v.* Mayor, etc., 8 Wend. 85, S. C. 22 Am. Dec. 622; Symonds *v.* Cincinnati, 14 Ohio, 147, S. C. 45 Am. Dec. 529; San Francisco, etc., R. R. Co. *v.* Caldwell, 31 Cal. 367; Greenville, etc., R. R. Co. *v.* Partlow, 5 Rich. 428; State *v.* Blauvelt, 34 N. J. L. 261; Nichols *v.* Bridgeport, 23 Conn. 189; Wyandotte, etc., R. R. Co. *v.* Waldo, 70 Mo. 629; Newby *v.* Platte Co., 25 Mo. 258.

<sup>3</sup>Wilson *v.* Rockford, etc., R. R. Co., 59 Ill. 273; Shipley *v.* Baltimore, etc., R. R. Co., 34 Md. 336; Giesy *v.* C. W. & Z. R. R. Co., 4 Ohio St. 330; 3 Sutherland on Damages, 456; City Council of Augusta *v.* Marks, 50 Ga. 612.

immediately affected.<sup>1</sup> Different blocks in the same town or city are regarded as separate parcels of land within the meaning of this rule.<sup>2</sup>

It is not within the power of the legislature to declare what the benefits shall be, for this is a judicial question, to be determined by a tribunal of a judicial character.<sup>3</sup> If it were in the power of the legislature to determine the amount of benefits or damages, the constitutional provision might, at the legislative pleasure, be made nugatory. There is a radical difference between the power to exclude benefits from consideration and the

<sup>1</sup>Todd *v.* Kankakee, etc., Co., 78 Ill. 530; Koestenbader *v.* Price, 41 Iowa, 204; St. Louis, etc., R. R. Co. *v.* Brown, 58 Ill. 61; State *v.* Digby, 5 Blackf. 543; Cleveland, etc., Co. *v.* Ball, 5 Ohio St. 568; Selma *v.* Rome, etc., Co., 45 Ga. 180; Meacham *v.* Fitchburg, etc., Co., 4 Cush. 291; Lexington *v.* Long, 31 Mo. 369; Railroad Co. *v.* Gilson, 8 Watts. 243; Paducah *v.* Memphis, etc., Co. *v.* Stovall, 12 Heisk. 1.

<sup>2</sup>Cameron *v.* Chicago, etc., Co. (Minn.), 43 N. W. R. 785; Fleming *v.* Chicago, etc., Co., 34 Iowa, 353; Wilcox *v.* St. Paul, etc., Co., 35 Minn. 439; Pittsburgh, etc., Co. *v.* Reich, 101 Ill. 157. Where there is a connected use, as where several town lots are used as one tract, all the lots may be considered as one parcel. Chicago, etc., Co. *v.* Dresel, 110 Ill. 89; Cummins *v.* Des Moines, etc., Co., 63 Iowa, 397; Reisner *v.* The Union, etc., Co., 27 Kan. 382; Port Huron, etc., Co. *v.* Voorhies, 50 Mich. 506; Sherwood *v.* St. Paul, etc., Co., 21 Minn. 122, Hannibal, etc., Co. *v.* Shaubacker, 57 Mo. 582. When there is no real subdivision of land into lots, the damages and benefits may be assessed with reference to the entire tract, although there may be a subdivision on paper. Welch *v.* Milwaukee, etc., Co., 27 Wis. 108; Sheldon *v.* Minneapolis, etc., Co., 29 Minn. 318. Where a water privilege, or other privilege of like

nature, is annexed to a parcel of land, the privilege may be considered as forming part of it. Board *v.* Labore, 37 Kan. 480; Chicago, etc., Co. *v.* Ward (Ill.), 18 N. E. R. 828. The cases upon the general subject are very numerous, and take various forms and phases. Dudley *v.* Minnesota, etc., Co. (Iowa), 42 N. W. R. 359; Ottawa, etc., Co. *v.* Ott (Kan.), 21 Pa. R. 343; Fayetteville, etc., Co. *v.* Hunt (Ark.), 11 S. W. R. 418; Wilcox *v.* Meriden, 57 Conn. 120, S. C. 17 Atl. R. 366; Minnesota Valley Co. *v.* Doran, 15 Minn. 230; Matter of Boston, etc., Co., 31 Hun. 461; Ham *v.* Wisconsin, etc., Co., 61 Iowa, 716. The fact that a farm consists of several governmental subdivisions, or lies in different counties, does not necessarily make the tracts several and separate. Holmes *v.* Minneapolis, etc., Co., 29 Minn. 242; Cedar Rapids Co. *v.* Ryan, 37 Minn. 38; Atchison, etc., Co. *v.* Gough, 29 Kan. 94; Kansas City Co. *v.* Merrill, 25 Kan. 421. Whether the lands shall be considered as one tract may be a question of fact. St. Paul, etc., Co. *v.* Murphy, 19 Minn. 500.

<sup>3</sup>Carson *v.* Coleman, 11 N. J. Eq. 106; Coster *v.* Tidewater Co., 18 N. J. Eq. 54; Charles River Bridge *v.* Warren River Bridge, 11 Peters, 420; Rich *v.* Chicago, 59 Ill. 286; Langford *v.* Commissioners, 16 Minn. 375.

power to determine their amount. Corporations, public or private, may, at their election, accept or reject the terms imposed by the statute, and no right, therefore, is infringed in providing in advance that the benefits shall be excluded from consideration,<sup>1</sup> but the land owner has no such election; he must yield to the law, and can exact nothing more than a compliance with the constitution and the statute. The judicial tribunals alone have power to expound and enforce the laws, and to them must be submitted all such questions as affect individual rights of property, including that of determining whether the seizure is by virtue of due process of law, as well as the amount and character of the loss entailed upon the citizen. Neither the right to seize lands nor the right to allow benefits to operate as a compensation for land seized is to be referred to the taxing power;<sup>2</sup> if this were so, serious consequences would result, for, once this were granted, it would follow that the power might, as a purely legislative prerogative, be exercised without judicial interference. There is, however, an essential difference between the two powers; if it were otherwise, the sovereign power of taxation could not, it seems clear, be delegated to private corporations, since purely legislative powers are incapable of delegation to a private individual or to corporations organized to conduct business for private gain. The question is well settled by authority, and the distinction between the two powers has been often exhibited and illustrated.<sup>3</sup>

The later cases enlarge and liberalize the rule for measuring the compensation of the property owners, and the current of judicial opinion is sweeping away from the narrow and illiberal rule

<sup>1</sup>The legislature may annex conditions to the grant favorable to the property owner, but it can not annex conditions which impair his substantial rights.

<sup>2</sup>Cooley's Const. Lim. (5th ed.), 703, 28; Sutton's Heirs v. Louisville, 5 Dana, 28.

<sup>3</sup>Gibbons v. Mobile, etc., Co., 36 Ala. 410; Aurora v. West, 9 Ind. 74; Stewart v. Supervisors of Polk County, 30 Iowa, 9; Gibson v. Mason, 5 Nev. 283;

Gilman v. Sheboygan, 2 Black, 510; Pine Grove v. Talcott, 19 Wall. 666; Mobile v. Kimball, 102 U. S. 691; People v. Mayor, 4 N. Y. 419; Hammet v. Philadelphia, 65 Pa. St. 146; Turner v. Althaus, 6 Neb. 54, Booth v. Woodbury, 32 Conn. 118; Palmer v. Way, 6 Col. 106; Norris v. Waco, 57 Texas, 635; State v. Demarest, 32 N. J. L. 528; Moran v. Troy, 16 N. Y. Sup. Ct. 540; Chambers v. Scatterlee, 40 Cal. 497.

borrowed from the English cases. It is true progress and it is inspired by a wise and salutary regard for justice. We think that it may now be safely affirmed that the law is that the compensation is not restricted to the value of the property actually seized, but that for the loss of incidents connected with the property taken the owner must be reimbursed.<sup>1</sup> This is just, for the incident is part of the property and is often an essential element of value. Where the incident is impaired or destroyed property is taken within the meaning of the constitution.

There is, however, a distinction between a right to compensation for property taken, and a right to damages for negligence in using the property seized, and for a temporary inconvenience or for injury done to the property owner. A land owner may maintain an action for damages where he could not claim a right to compensation under the constitution.<sup>2</sup> Thus a land owner can not recover in condemnation proceedings for a detriment to his land outside of the right of way by taking soil; his remedy is an action for the trespass.<sup>3</sup> So, the remedy for

<sup>1</sup> *Drucker v. Manhattan, etc., Co.*, 106 N. Y. 157, S. C. 12 N. E. 568; *Lahr v. Metropolitan, etc., Co.*, 104 N. Y. 268; *Vanderlip v. Grand Rapids (Mich.)*, 41 N. W. R. 677; *Wilcox v. Meriden*, 57 Conn. 120; *Griffin v. Shreveport, etc., Co. (La.)*, 6 So. R. 624; *Berdler's App. (Pa.)*, 17 Atl. R. 244; *Sullivan v. North Hudson, etc., Co. (N. J.)*, 18 Atl. R. 689; *In re Union, etc., Co.*, 7 N. Y. S. 854; *In re Railroad*, 27 Hun. 116; *Enos v. Chicago, etc., Co. (Iowa)*, 42 N. W. 575; *Dudley v. Minnesota, etc., Co. (Iowa)*, 42 N. W. R. 359; *Jackson v. Kiel (Col.)*, 22 Pac. R. 504; *Fort Scott, etc., Co. v. Fox*, 22 Pac. 583; *Baltimore, etc., Co. v. Duke (Pa.)*, 18 Atl. R. 566; *Shepard v. Baltimore, etc., Co.*, 9 Sup. Ct. R. 598; *Chicago, etc., Co. v. Hazels, (Neb.)*, 42 N. W. R. 93; *Central Branch, etc., Co. v. Andrews (Kan.)*, 21 Pac. R. 276; *Grand Rapids, etc., Co. v. Chesebro (Mich.)*, 42 N. W. R. 66; *Doud v. Mason City, etc., Co. (Iowa)*, 41 N. W. R. 65; *Thompson v. Seabasticools (Me.)*,

6 Atl. R. 332; *Chicago, etc., Co. v. Ward (Ill.)*, 18 N. E. 828; *Kansas City, etc., Co. v. Story (Mo.)*, 10 S. W. R. 203; *Chicago v. Rumsey*, 87 Ill. 348; *Morrison v. Hinkson*, 87 Ill. 587; *McCarthy v. Metropolitan Board, L. R.*, 10 Moak R. 1; *Rigney v. Chicago*, 102 Ill. 64; *Caledonian Co. v. Walker*, 7 App. Cases, 569.

<sup>2</sup> *Edmunson, etc., Co. v. Pittsburg, etc., Co.*, 111 Pa. St. 316; *Porterfield v. Bond*, 38 Fed. R. 391; *Campbell v. Metropolitan Co. (Ga.)*, 9 S. E. R. 1078; *Turner v. Sheffield, etc., Co.*, 10 M. & W. 425; *East, etc., Dock Co. v. Gattke*, 20 L. J. N. S. Ch. 217; *Stack v. City*, 85 Ill. 377; *Thompson v. Pa. Co.*, 51 N. J. L. 42, S. C. 15 Atl. R. 833; *Organ v. Memphis, etc., Co. (Ark.)*, 11 S. W. R. 96; *Reming v. New York, etc., Co.*, 7 N. Y. S. 516; *Union Springs Co. v. Jones*, 58 Ala. 654; *Pa. Co. v. Walsh*, 124 Pa. 544, S. C. 17 Atl. 186.

<sup>3</sup> *Doud v. Mason City, etc., Co. (Ia.)*, 41 N. W. R. 65.

an unreasonable obstruction of a street in constructing a railroad is by an action for damages.<sup>1</sup>

Incidental injuries are to be compensated, and the compensation for such injuries added to the value of the land forms the measure of compensation. Where benefits are allowable, they are, as we have seen, to be taken into consideration in determining the compensation; where they are not allowable by the constitution, statute, or rule of law declared by the decisions of the State where the controversy arises, then the value of the land and the incidental injuries are both to be taken into consideration irrespective of benefits. The term "consequential injuries" has been so much used as signifying a class of injuries for which no action will lie, that it would most likely produce confusion not to continue its use, although in strictness the term "consequential injuries" is not synonymous with remote injuries.<sup>2</sup> It is difficult to say what shall be considered incidental injuries, for the line between injuries deemed remote and consequential and those considered proximate and incidental is shadowy and indistinct. Reference to the adjudged cases will furnish something like an adequate idea of the principles which govern this subject.

If the part of the land not taken is so reduced in size, or changed in form or shape, as to seriously impair its market value, then that fact should be taken into consideration in estimating the damages.<sup>3</sup> It is, however, to be kept in mind that the incidental injuries for which compensation will be allowed

<sup>1</sup> *Shepard v. Baltimore, etc., Co.*, 9 Sup Ct. R. 598. An unlawful use subjects the corporation to an action for damages. *Porterfield v. Bond*, 38 F R. 391.

<sup>2</sup> *Sedgwick Damages*, 90; 2 *Dillon Municipal Corp.* (3d ed.), section 987; *Peirce on Railroads*, 197; *Angell Highw.*, section 215; *Radcliff's Executor v. Mayor*, 4 Comst. 195; *Callender v. Marsh.* 1 Pick. 417; *Wilson v. Mayor*, 1 Denio, 555; *Cooley's Const. Lim.* (5th ed.), 671, 676.

<sup>3</sup> *Tucker v. Mass., etc., Co.*, 118 Mass. 546; *Bangor, etc., Co. v. McComb*, 60

Me. 290; *Mt. Washington Road*, 35 N. H. 134; *Hannibal, etc., Co. v. Schaubacher*, 57 Mo. 582; *Cleveland, etc., Co. v. Ball*, 5 Ohio St. 509; *Edmunds v. Boston*, 108 Mass. 535; *Somerville Co. v. Doughty*, 22 N. J. Law, 495; *Watson v. Pittsburgh, etc., Co.*, 37 Pa. St. 469, *Raleigh, etc., Co. v. Wicker*, 74 N. C. 220; *Richmond, etc., Co. v. Rogers*, 1 Duvall, 138; *White v. Charlotte R. R.*, 6 Rich. 47; *Baltimore, etc., Co. v. Lansing*, 52 Ind. 229; *Keithsburg v. Henry*, 79 Ill. 290, *Bigelow v. Wisconsin R. R.*, 27 Wis. 478; *Brooks v. Davenport*, 37 Ia. 99; *Hursh v. St. Paul*, 17 Minn. 439.

must, like benefits, be confined to the parcel or lot of land directly affected by the opening of the way; injuries to other and different parcels of property can not be taken into account. If the public use is such as to make the enjoyment of the property not taken seriously inconvenient and uncomfortable, due compensation should be made, but in such case the injury must appear to be a special and peculiar one; it will not be sufficient to show an injury suffered in common with the community at large.<sup>1</sup> Where the land not seized is made liable to injury from floods,<sup>2</sup> that fact should enter into the estimate, or if the taking destroys valuable water rights, damages for that injury should be awarded.<sup>3</sup> It has also been held that the injury to the particular business carried on by the owner at the time of the taking should be estimated, and that an owner is entitled to compensation for injury to business conducted on the land previous to and at the time of its appropriation for the public use.<sup>4</sup> Where the opening of the way imposes upon the land owner the burden of building and maintaining additional fences, he is entitled to compensation, for the burden is an incidental injury.<sup>5</sup> Where farm crossings or private ways are made reasonably necessary by the opening of the way, and the duty is not imposed upon the corporation of constructing and maintaining

<sup>1</sup> Pittsburgh, etc., Co. v. Rose, 74 Pa. St. 363; Matter of Utica R. R., 56 Barb. 464; Snyder v. Western Union R. R. Co., 25 Wis. 60; Tucker v. Mass., etc., Co., 118 Mass. 546; Wilson v. Rockford, etc., Co., 59 Ill. 273.

<sup>2</sup> Dearborn v. Boston, etc., Co., 24 N. H. 179; Colville v. St. Paul, etc., Co., 19 Minn. 283.

<sup>3</sup> Peoria, etc., Co. v. Bryant, 57 Ill. 473; Young v. Harrison, 17 Ga. 30; Shenango Co. v. Braham, 79 Pa. St. 447.

<sup>4</sup> Western R. R. Co. v. Hill, 56 Pa. St. 460; Sherwood v. St. Paul R. R. Co., 21 Minn., 127; Driver v. Western Union Co., 32 Wis. 569; St. Louis, etc., Co. v. Capps, 72 Ill. 188; Virginia, etc., Co. v. Henry, 8 Nev. 165. Where the use of the property has been long continued and has imparted to it a pe-

culiar value, that fact should be considered in estimating the compensation. King v. Minneapolis, etc., Co., 32 Minn. 224; Montgomery Co. v. Schuylkill Bridge, 110 Pa. St. 54.

<sup>5</sup> Bland v. Hixenburgh, 39 Ia. 532; Milwaukee, etc., Co. v. Eble, 4 Chandler, 72; Louisville, etc., Co. v. Glazebrook, 1 Bush. 325; Hagerman v. Moore, 84 Ind. 496; Readington v. Dille, 24 N. J. L. 209; St. Louis, etc., Co. v. Anderson, 39 Ark. 167; Sacramento, etc., Co. v. Moffatt, 6 Cal. 74; Leavenworth, etc., Co. v. Paul, 28 Kan. 816; Pittsburgh, etc., Co. v. McClosky, 110 Pa. St. 436; Stone v. Heath, 135 Mass. 561; Winona, etc., Co. v. Denman, 10 Minn. 267. Compare Alabama, etc., Co. v. Burkett, 46 Ala. 569, and North E. R. R. v. Sineath, 8 Rich. 185.

such crossings, the owner is entitled to have the cost of constructing and maintaining them included in the estimate of damages, but this right exists only where such private ways, or crossings, are reasonably necessary and made so by the opening of the public way.<sup>1</sup> Where the opening of the highway makes it reasonably necessary to erect walls to protect buildings situated on the land not taken, the reasonable cost of constructing and maintaining the walls should enter into the estimate of damages.<sup>2</sup> Where a building is taken, the value of the structure, and not the value of the materials composing it, should be taken into account, but if the owner takes any part of the materials he must make reasonable allowance for them.<sup>3</sup>

If the situation, quality and character of the property are such as to make it peculiarly adapted to a certain purpose and to give it an especial value for that purpose, then damages should be assessed with reference to its adaptability to that purpose.<sup>4</sup> In one case it was said the enquiry should be, what is the value of the property for the most advantageous purposes to which it may be applied.<sup>5</sup> The general principle stated is a just one, for an owner who is compelled to part with his property should have allotted him its full worth, and that is found by ascertaining to what purpose it is best adapted, and its value should be tested by that standard, not, of course, allowing any merely fanciful or speculative conjectures to enter into the case.

Incidental injuries stop short of remote, conjectural, or speculative injuries, for the law does not attempt to furnish an absolutely complete indemnity to the land owner; it only undertakes to secure to him compensation for such injuries as are the natural and proximate result of the appropriation of the prop-

<sup>1</sup> Peoria, etc., Co. v. Sawyer, 71 Ill. 361.

<sup>2</sup> Thompson v. Milwaukee, etc., Co., 27 Wis. 93; Com. v. Boston, etc., Co., 3 Cush. 25; Marsden v. Cambridge, 114 Mass. 490.

<sup>3</sup> Lafayette, etc., Co. v. Winslow, 66 Ill. 219

<sup>4</sup> Boom Co. v. Patterson, 98 U. S. 403; 2 Dillon Municipal Corp. (3d ed.), section 623; 3 Sutherland Damages,

441, auth. n. It is always proper to show facts which give peculiar value to the property. Lance v. Chicago, etc., Co., 57 Ia. 636; St. Louis, etc., Co. v. Mollett, 59 Ill. 235; Gile v. Stevens, 13 Gray, 146; Dupuis v. Chicago, etc., Co., 115 Ill. 97; Pittsburgh, etc., Co. v. Patterson, 107 Pa. St. 461; King v. Minneapolis, etc., Co., 32 Minn. 224.

<sup>5</sup> In re Furman Street, 17 Wend. 669.



erty to the particular public use. Acting on this general rule, it was held in one case that the jury could not take into consideration the prospective opening of streets in the vicinity which it was supposed would enhance the value of the property.<sup>1</sup> In another case it was held that the law "affords no protection against new competitions, nor against changes introduced by time and the progress of the age."<sup>2</sup> One who is deprived of a privilege which he enjoys without compensation, and by the mere sufferance of another, can not have that privilege taken into account in computing damages.<sup>3</sup> Nor, as a general rule, can loss of prospective profits be given consideration,<sup>4</sup> nor, it is held, can an allowance be made for loss of business by one who has derived profit from hiring horses to tourists,<sup>5</sup> nor, so it is declared, can an allowance be made for the loss of the good will of a business.<sup>6</sup> When, however, there is an actual interruption of business entailing present loss, a different rule obtains.<sup>7</sup> Prospective annoyance from the use of a highway in a lawful manner can not be considered as an element in the computation of damages, nor can it be shown for the purpose of enhancing the recovery that an unlawful use of the highway will be made, thereby causing annoyance to the owner.<sup>8</sup> No allowance can be made for injuries which are not peculiar to the estate of the owner, and all losses which are suffered in common with the public generally are deemed strictly consequential damages, for which no compensation can be awarded.<sup>9</sup>

<sup>1</sup> *Burt v. Wigglesmith*, 117 Mass. 302.

<sup>2</sup> *Adden v. Railroad*, 55 N. H. 413; *Pet. of Mt. Washington R. R.*, 35 N. H. 146; *Proprietors of New Locks v. Railroad*, 10 Cush. 389.

<sup>3</sup> *Hatch v. Cincinnati, etc., Co.*, 18 Ohio St. 93.

<sup>4</sup> *Thompson v. Androscoggon Co.*, 54 N. H. 545; *Driver v. Western Union, etc., Co.*, 32 Wis. 569; *Whitman v. Boston R. R.*, 3 Allen, 133; *Boston R. v. Old Colony R. R.*, 12 Cush. 605; *Selma R. R. Co. v. Campb.*, 45 Ga. 180; *Schuykill Co. v. Friedly*, 6 Whart. 109.

See, however, *Schuykill Nav. Co. v. Fair*, 4 W. & S. 362.

<sup>5</sup> *Mt. Washington Co.*, 35 N. H. 134.

<sup>6</sup> *Edmunds v. Boston*, 108 Mass. 535. We are inclined to think the rule stated in the case cited should be limited.

<sup>7</sup> *Patterson v. Boston*, 23 Pick. 425.

<sup>8</sup> *First Parish Church v. Middlesex*, 7 Gray, 106; *Patten v. Northern Central R. R.*, 33 Pa. St. 426.

<sup>9</sup> *Adden v. R. R.*, 55 N. H. 415; *Proprietors of Locks v. Railroad*, 10 Cush. 389; *Bangor R. R. v. McComb*, 60 Me. 290.

The land owner is entitled to have his land estimated at its fair market value, and is not restricted to the amount it would probably bring at a forced sale.<sup>1</sup> The public compels him to part with his property, and the public must pay for it what it would bring in the market with fair and reasonable time and opportunity for offering it for sale.<sup>2</sup> Nothing, however, can be added to the price on account of its being necessary for the use of the corporation seeking to make the appropriation.<sup>3</sup> The value of the land is not to be measured by the appraisal put upon it for the purposes of taxation.<sup>4</sup> The assessment list made out by the owner is admissible in evidence against him, but is not conclusive.<sup>5</sup>

Witnesses acquainted with the market value of the land seized may state their opinion of its value. It is essential that some acquaintance with the value of the land in the market should be shown, but it is not material how the knowledge was obtained.<sup>6</sup> The weight of the witness's opinion will in a great measure depend upon the acquaintance which he is shown to possess with the subject of values, and the facts which he gives as constituting the foundation of his opinion.<sup>7</sup> It is the prevailing opinion, although there is a sharp conflict in the authorities, that it is not competent to ask a witness how much damages a party has sustained, since this would be to put the witness in the

<sup>1</sup> *Boom Co. v. Patterson*, 98 U. S. 403; *Lawrence v. Boston*, 119 Mass. 126; *Somerville v. Doughty*, 22 N. J. L. 495; *Robb v. Maysville, etc., Co.*, 3 Metc. (Ky.) 117; *Memphis v. Bolton*, 9 Heisk. 508.

<sup>2</sup> *Dillon Municipal Corp.* (3d ed.), section 624.

<sup>3</sup> *Virginia, etc., Co. v. Elliott*, 5 Nev. 358; *Peirce on Railroads*, 213.

<sup>4</sup> *Brown v. Providence R. R. Co.*, 5 Gray, 35.

<sup>5</sup> *Virginia R. R. v. Henry*, 8 Nev. 165.

<sup>6</sup> *Shattuck v. Stoneham R. R. Co.*, 6 Allen, 115; *Swan v. Middlesex*, 101 Mass. 173; *Sexton v. Bridgewater*, 116 Mass. 200; *Robertson v. Knapp*, 35 N.

Y. 91; *Brown v. Corey*, 43 Pa. St. 495; *Pittsburg, etc., Co. v. Rose*, 74 Pa. St. 362; *Illinois, etc., Co. v. Van Horn*, 18 Ill. 252; *Lehmicke v. St. Paul*, 19 Minn. 464; *Hosher v. Kansas City R. R.*, 60 Mo. 303; *Snyder v. Western Union Co.*, 25 Wis. 60; *Johnson v. Thompson*, 72 Ind. 167, S. C. 37 Am. Rep. 152; *Bowen v. Bowen*, 74 Ind. 470; *Printz v. People*, 42 Mich. 144, S. C. 36 Am. Rep. 437.

<sup>7</sup> *Cole v. State*, 75 Ind. 511, *vide p.* 514; *Snow v. Boston, etc., Co.*, 65 Me. 230; *Dwight v. Hampden*, 11 Cush. 201; *Pa. Co. v. Bunnell*, 81 Pa. St. 414; *Lafayette R. R. Co. v. Winslow*, 66 Ill. 219; *Simons v. St. Paul*, 18 Minn. 184.

place of the jury.<sup>1</sup> It is however, according to the weight of authority, competent to ask a witness, qualified to testify upon the subject, the value of the land before the way is opened and what its value will be after the way is constructed.<sup>2</sup> This does not invade the province of the jury, because it simply asks for the opinion of the witness as to values and not as to damages.<sup>3</sup> It is difficult to perceive how any other rule than that stated can be maintained on principle. No matter how minutely lands and their surroundings may be described, a jury, unless possessing peculiar knowledge of the matter in controversy, can not, without the judgment of persons acquainted with values, justly determine the injury or benefit which accrues to the land owner by the opening of a highway or the construction of a ditch. The object of evidence is to place before a jury all the facts essential to a just decision of the merits of the legal controversy, so that the rights of the contestants may be justly determined, and this object is defeated unless testimony as to the value of the land with and without the highway is allowed to be introduced. Without some guide of this character the verdict must be the product of conjecture rather than a conclusion from proved facts.

The object of the various constitutional provisions upon the subject, as every one can see, is to secure to the owner just com-

<sup>1</sup> Mills Eminent Domain, section 165; Evansville, etc., Co. v. Fitzpatrick, 10 Ind. 120; The Ohio, etc., Co. v. Nickless, 71 Ind. 271; Dalzell v. Davenport, 12 Iowa, 437; Tingley v. Providence, 8 R. I. 493; Hoshier v. Kansas City, 60 Mo. 320; Rockford v. McKinley, 64 Ill. 338; Atlantic and Great Western v. Campbell, 4 Ohio St. 583; Cleveland, etc., Co. v. Ball, 5 Ohio St. 568; Springfield, etc., Co. v. Chicago, etc., Co., 67 Ill. 142; Elizabethtown, etc., Co. v. Helm, 8 Bush. 681; Alabama, etc., Co. v. Burket, 42 Ala. 83. *Contra*, Vandine v. Burpee, 13 Metc. 288; Snyder v. Western Union, etc., Co., 25 Wis. 60; Diedrich v. Northwestern, etc., Co., 47 Wis. 662; Snow v. Boston, etc., Co., 65 Me. 230.

<sup>2</sup> Yost v. Conroy *et al.*, 92 Ind. 464; Pittsburg Co. v. Robinson, 95 Pa. St. 426; Swan v. Middlesex, 101 Mass. 173; Eberheart v. Chicago R. R. Co., 70 Ill. 347; Webber v. Eastern R. R., 2 Metcalf, 147; Pittsburg Co. v. Rose, 74 Pa. St. 362; Farrand v. Chicago R. R., 21 Wis. 435; Parks v. Wisconsin, 33 Wis. 413; St. Paul R. R. v. Murphy, 19 Minn. 500; Missouri, etc., Co. v. Owen, 8 Kan. 409; Carter v. Thurston, 58 N. H. 104; Rogers Expert Testimony, 211, 213; Peirce on Railroads, 227; 1 Whart. Evidence, section 447. For cases holding a different doctrine, see preceding note.

<sup>3</sup> The Evansville, etc., Co. v. Cochran, 10 Ind. 560; Johnson v. Thompson, 72 Ind. 167, S. C. 37 Am. Rep. 152.

pensation for all loss proximately resulting from the seizure, but there is, as we have seen, much diversity of opinion as to what constitutes a just compensation. It is obvious that the value of the property actually seized can not in all cases be the full measure of damages, for other injuries may be inflicted which should be met by a fair and just assessment, as nothing less than an indemnity for the loss resulting from the taking can be a just compensation within the meaning of the constitution. Damages are assessed once for all and the measure should be the entire loss sustained by the owner, including in one assessment all injuries resulting from the appropriation,<sup>1</sup> whatever

<sup>1</sup> *Miller v. Mayor*, 35 N. J. L. 460; *Renwick v. D. & N. W. R. Co.*, 49 Ia. 664; *Lawrence v. Boston*, 119 Mass. 126; *State v. Hulick*, 33 N. J. L. 307. *Galveston, etc., R. R. Co. v. Pfeuffer*, 56 Tex. 66; *City v. Nagle*, 113 Ind. 425; *City v. Voegler*, 103 Ind. 314; *Lafayette v. New Albany, etc., Co.*, 13 Ind. 90; *Powers v. Council Bluffs*, 45 Iowa, 642, S. C. 25 Am. Rep. 792; *Town v. Cheshire R. R.*, 23 N. H. 83; *Adams v. Hastings*, 18 Minn. 260, *Seely v. Alden*, 61 Pa. St. 302; *Fowle v. New Haven, etc., Co.*, 112 Mass. 334, S. C. 17 Am. Rep. 106; *Cadle v. Muscatine, etc., Co.*, 44 Ia. 11; *Illinois R. R. Co. v. Grabill*, 50 Ill. 241; *Elizabethtown, etc., Co. v. Combs*, 10 Bush. (Ky.) 382. In the recent well considered and strongly reasoned case of *Denver City, etc., Co. v. Middaugh* (Col.), 21 Pac. R. 565, it was held that in estimating damages the probability of leaking from a reservoir must be anticipated and included in the assessment. The learned judge by whom the opinion of the court was prepared said: "I find the general current of authority to be, that all damages present or prospective, that are the natural or reasonable incident of the improvement, must be assessed in the condemnation proceedings, not including such as may arise from negligent or unskillful construction or use thereof." To the authorities already cited by us we

may add others which fully sustain the doctrine asserted by the supreme court of Colorado. *Ortwine v. Baltimore, etc., Co.*, 16 Md. 387; *Troy v. Cheshire R. R.*, 23 N. H. 83; *Town v. Faulkner*, 56 N. H. 255; *Blesch v. Railroad Company*, 48 Wis. 168, S. C. 2 N. W. R. 113; *In re Railroad*, 56 Barb. 456; *Aldrich v. Railway Co.*, 21 N. H. 359; *Canal Co. v. Grove*, 11 Gill. & J. 398; *Miller v. Des Moines R. R.*, 63 Ia. 680; *Kansas R. R. Co. v. Muhlman*, 17 Kan. 224; *Fowle v. New Haven, etc., Co.*, 112 Mass. 334; *Baldwin v. Chicago, etc.*, 35 Minn. 354. There is, as we have elsewhere said, a clear distinction between a permanent injury constituting a taking and a negligent or wrongful act giving a right of action, but not constituting a seizure of the property within the meaning of the constitution. *Railway Co. v. Gilliland*, 56 Pa. St. 445; *Railroad Co. v. Daniel*, 20 Gratt. 349. All the injuries that are permanent, and are such as constitute an element of compensation, must be assessed in one proceeding, for successive actions can not be maintained. *City of Denver v. Boyer*, 7 Col. 127, S. C. 2 Pac. R. 6. *Contra*, *Uline v. New York, etc., Co.*, 101 N. Y. 98; *Texas, etc., Co. v. Long*, 1 Tex. App. Civil Cases, 281; *Ford v. Santa Cruz R. R. Co.*, 59 Cal. 290; *Dickson v. Chicago, etc., Co.*, 71 Mo. 575.

may be their character.<sup>1</sup> Merely conjectural or speculative damages can not be awarded,<sup>2</sup> but where a loss proximately results from the use to which the property is applied, it should be taken into account in the award of compensation. It is not easy to define the precise limits within which the amount of recovery shall be confined, for much depends upon the facts of each particular case; thus in many cases no appreciable injury may be done to the land not taken, while in others a serious injury may be inflicted, and may be the proximate, and not the remote, consequence of the use to which the property is devoted.<sup>2</sup>

It is evident that in many instances payment for the land actually seized will not justly compensate the land owner for the loss he has sustained. In various ways the land of which he may remain the owner may be lessened in value, and expenses and burdens imposed upon him, which, but for the seizure, he

<sup>1</sup> *Montgomery & Co. v. Stockton*, 43 *Ihd.* 328; *Whitewater Valley Co. v. McClure*, 29 *Ind.* 536; *Freedle v. N. C. R. R. Co.*, 4 *Jones N. C.* 89; *Pacific R. R. Co. v. Crystal*, 25 *Mo.* 544; *St. Louis, etc., Co. v. Richardson*, 45 *Mo.* 466; *Minn. Centr. Co. v. McNamara*, 13 *Minn.* 508; *Reisner v. Union, etc., Co.*, 27 *Kan.* 382.

<sup>2</sup> *Green v. State*, 73 *Cal.* 29; 14 *Pac.* 610; *Lamb v. Reclamation Dist.*, 73 *Cal.* 125, *S. C.* 2 *Am. St. R.* 775; *Trinity, etc., Co. v. Bourne*, 11 *Col.* 59, *S. C.* 16 *Pac. R.* 839; *Fairchild v. St. Louis*, 79 *Mo.* 85, *S. C.* 11 *S. W. R.* 60. In proceedings to open a street, the property owner is not entitled to have the expense of cleaning the snow from the street to be considered as an element in computing his compensation. *City of Detroit v. Beecher* (*Mich.*), 42 *N. W. R.* 986. Nor is he entitled to have the fact that he may be required to pay assessments for improvements and repairs taken into consideration. *Ibid.* See *Pingrey v. Cherokee, etc., Co.* (*Ia.*), 43 *N. W.* 285. But there may be some reference to what will

probably be done in the future, as that a station will be erected, or that there may be leakage from a reservoir. *Stim v. Metropolitan, etc., Co.*, 4 *N. Y. S.* 325; *Denver, etc., Co. v. Middaugh* (*Col.*), 21 *Pac.* 565. In the well considered cases of *Drucker v. Manhattan, etc., Co.*, 106 *N. Y.* 157, and *Lahr v. Metropolitan, etc., Co.*, 104 *N. Y.* 268, it was held that loss of business formed an element of recovery, and although this conclusion seems opposed to the weight of authority, it in truth is not so. The difference in the facts discriminates these cases from those which lay down the general rule. It is always true that remote and conjectural damages can not be recovered, but it is not always true that loss of business is remote or conjectural. *City of Terre Haute v. Hudnut*, 112 *Ind.* 542; *Simmons v. Brown*, 5 *R. I.* 299; *Chandler v. Allison*, 10 *Mich.* 260; *White v. Mosely*, 8 *Pick.* 356; *Shafer v. Wilson*, 44 *Md.* 268; *Lacour v. Mayor*, 3 *Duer*, 406; *Chapman v. Kirby*, 49 *Ill.* 211; *Tarleton v. McGauly*, 1 *Peake N. P. C.* 205.

would be free from. When part only of a lot or a tract of land is actually seized, but direct and substantial injury is done to the remainder, the proprietor is entitled to recover to the extent of the injury done.<sup>1</sup> If the seizure leaves so little of the lot or tract that it can not be used for any ordinary purpose, the owner is entitled to be reimbursed for the loss sustained, and the same result must follow if the land or lot is so cut up as to substantially and actually diminish its value.<sup>2</sup> If the effect of locating and opening the road or street is such as to render the remainder of the premises uninhabitable, or to expose them to real and immediate danger, the owner has suffered a loss for which compensation must be made.<sup>3</sup>

Whether the entire tract or only a part be taken, the effect on the market value of the property is, in general, the material question. Upon this point the authorities are so numerous and so harmonious that it is unnecessary to cite them, but, while the general rule is well settled, and easily stated, there is some difficulty in its application. The principal cause of this difficulty lies in determining what elements shall be considered in ascertaining the market value of property. It is not difficult to perceive that in a thriving and rapidly growing town the value of land may rapidly increase, and yet the decisions are to the effect that prospective or speculative value can not be taken into account in estimating the damages to the property owner. In estimating the market value of the property it is not proper to consider what it would bring at a forced sale, but the just rule is to consider what it will bring in the hands of a prudent seller, with reasonable time allowed him for disposing of it.<sup>4</sup> The

<sup>1</sup> *Petition of Mount Washington R. Co.*, 35 N. H. 134; *Virginia, etc., Co. v. Henry*, 8 Nev. 165; *Indiana, etc., Co. v. Allen*, 100 Ind. 409; *Bangor, etc., R. R. v. McComb*, 60 Me. 290; *Page v. Chicago, etc., Co.*, 70 Ill. 324.

<sup>2</sup> *Baltimore, etc., Co. v. Lansing*, 52 Ind. 229; *Jones v. Chicago, etc., Co.*, 68 Ill. 380; *Penna. Co. v. Bunnell*, 81 Pa. St. 427; *Winona R. R. Co. v. Waldon*, 11 Minn. 515; *Bland v. Hixenbaugh*, 39 Ia. 582.

<sup>3</sup> *Pierce v. Worcester R. R. Co.*, 105

Mass. 199; *Somerville v. Doughty*, 22 N. J. L. 495; *Wooster v. Sugar River R. R.*, 57 Wis. 311; *Wilson v. Des Moines R. R.*, 67 Ia. 509; *Lafayette R. R. v. Murdock*, 68 Ind. 137.

<sup>4</sup> *Everett v. Pacific, etc., Co.*, 59 Iowa, 248; *Lawrence v. Boston*, 119 Mass. 126; *Fremont, etc., R. R. v. Whalen*, 11 Neb. 585; *Virginia, etc., Co. v. Elliott*, 5 Nev. 358; *Providence v. Howard*, 6 R. I. 514; *West v. Milwaukee, etc., Co.*, 56 Wis. 318; *Somerville, etc., Co. v. Doughty*, 22 N. J. L. 495.

value is not what it will bring in the hands of one compelled to sell, nor what one will give who is compelled to buy, but what it will bring in the hands of one desiring to sell from one willing to buy.<sup>1</sup> The reluctance of the owner to part with his land, and the necessity that the corporation should secure it, should be excluded from the consideration of the triers.<sup>2</sup> The value to the owner is not the test, for he may place upon it a value that a prudent seller could not obtain, and one which no prudent buyer desiring to purchase would be willing to give.<sup>3</sup> Value is not to be estimated solely from the use made of the land at the time of the seizure, but the uses to which it is adapted may properly be taken into account in determining what will justly compensate the owner of the land seized, since the use to which the property is adapted may exert an important influence upon its market value. The estimate of value should be based on the use which men of ordinary prudence and sagacity would make of the land.<sup>4</sup> Future contingent value can not be considered, and yet it is not improper to consider the surroundings of the property and the probability that a use may reasonably be made of it more profitable than that to which the owner has devoted it.<sup>5</sup> It is held that, although it may be proper to show the location and surroundings and the uses to which the land is adapted, yet it is not competent to prove by the owner the use to which he intends to devote it.<sup>6</sup> The peculiar situation of property, and the nature of the purpose to which it is adapted, may give it a special market value, and to

<sup>1</sup> *Pittsburg, etc., Co. v. Vance*, 115 Pa. St. 325; *Lawrence v. Boston*, 119 Mass. 126; *Little Rock, etc., Co. v. Woodruff*, 49 Ark. 381.

<sup>2</sup> *Harrison v. Iowa Midland*, 36 Iowa, 323; *Bobb v. Maysville, etc., Co.*, 3 Metcf. (Ky.) 117; *Selma, etc., Co. v. Keith*, 53 Ga. 178; *Moulton v. Newburyport, etc., Co.*, 137 Mass. 163; *Montgomery Co. v. Schuylkill Bridge Co.*, 110 Pa. St. 54.

<sup>3</sup> *Tufts v. Charlestown*, 70 Mass. 537; *Matter of Furman St.*, 17 Wend. 649; *Robb v. Maysville, etc., Co.*, 3 Metcf. (Ky.) 117.

<sup>4</sup> *Mississippi, etc., Co. v. Ring*, 58 Mo. 491; *Matter of Furman St.*, 17 Wend. 649; *Regina v. Brown*, 36 L. J. (Q. B.) 322; *Jacksonville R. R. Co. v. Walsh*, 106 Ill. 253.

<sup>5</sup> *Union R. R. Co. v. Moore*, 80 Ind. 458; *Shenandoah R. R. Co. v. Shephard*, 26 W. Va. 672; *Chicago, etc., Co. v. Chicago*, 112 Ill. 589.

<sup>6</sup> *Fairbanks v. Fitchburg R. R.*, 110 Mass. 224; *Pinkham v. Chelmsford*, 109 Mass. 225; *Conter v. St. Paul*, 22 Minn. 342.

that value the owner is entitled, although he may not himself make a profitable use of his property.<sup>1</sup>

There are many injuries resulting from the opening of streets and roads for which land owners can not receive compensation. This is true of almost all great public works. It is seldom that a public improvement, although benefiting by far the greater number of persons, does not, in some way, cause loss to others. Thus, the opening of a road common and free to all may greatly lessen the receipts of a toll road running between the same places, but for such an injury no compensation can be awarded. Again, the opening of a new street may draw travel from an old one and decrease the business of those having shops on the latter, and in such a case, although there is undeniably a resulting injury, there is still no right to legal redress. What is true of public acts is also true of the acts of individuals, for it very frequently happens that men rightfully using their own property cause loss to others. Thus, a stage route may be changed and travel be diverted to a new route, to the serious loss of inn-keepers and others on the abandoned line. Still more forcibly illustrating this general principle are the cases—and they have long stood as acknowledged law—which declare that one land owner may build on his own land so as to stop the light or air from his neighbors,<sup>2</sup> and those which hold that a man may dig into his own land, though it compel the adjoining owner to shore his house.<sup>3</sup> This principle is applied to the acts of public officers engaged in opening and repairing highways, and there is, perhaps, more reason for applying it to officers than to private persons, for the former are engaged in the performance of acts for the public good, while the latter are influenced only by self-interest.<sup>4</sup>

<sup>1</sup> *Boom Co. v. Patterson*, 98 U. S. 403; *Cohen v. St. Louis, etc., Co.*, 34 Kan. 158; *Trustees v. Dennett*, 5 N. Y. Supreme Ct. 217.

<sup>2</sup> *Parker v. Foot*, 19 Wend. 309; *Mahan v. Brown*, 13 Wend. 261; *Radcliff's Executor v. Brooklyn*, 4 Comstock, 195, opinion Bronson J.

<sup>3</sup> *Peyton v. Mayor*, 9 B. & C. 725; *Chadwick v. Tower*, 6 Bing. 1.

<sup>4</sup> *The Governor, etc., Co. v. Meredith*, 4 Term R. 794; *Boulton v. Crowther*, 1 B. & C. 703; *Sutton v. Clark*, 6 Taunt. 34; *Dore v. Gray*, 2 Term Rep. 358; *Rex v. Bristol Dock Co.*, 6 B. & C. 181; *Hamen v. Tapperden*, 1 East. 555; *Roberts v. Read*, 16 East. 215; *Hall v. Smith*, 2 Bing. 156; *White House*, 10 C. B. 779; *Mersey Dock Co.*, 11 H. L. Cases, 713; *Addison on Torts*, 725, 727.



The doctrine of the English courts has found firm lodgment in the jurisprudence of America. It was early asserted in Massachusetts,<sup>1</sup> and has been followed by a long and almost unbroken line of decisions. Some of the courts have quarreled with the rigorous application of the rule,<sup>2</sup> but none have denied that the principle which, by a liberal construction, is held to be expressed in the maxim *damnum absque injuria*, is a sound and salutary one.

The injuries for which the law affords no redress have been generally, although not altogether accurately, denominated consequential injuries. It would lead to error to affirm that all injuries to which the term "consequential" is applied are such as are not within the protection of the constitution, or are such as can not be redressed in a civil action, but courts and text writers have generally used the term, when discussing rights and liabilities growing out of the opening and maintenance of highways, as meaning such injuries as are not within the constitutional provision, nor the subject of an action.<sup>3</sup> What injuries

<sup>1</sup>Callender v. Marsh, 1 Pick. 417; Rounds v. Mumford, 2 R. I. 154; Green v. Borough of Reading, 9 Watts, 382; O'Conner v. Pittsburgh, 18 Pa. 187; Graves v. Otis, 2 Hill, 466; Taylor v. City, 14 Miss. 20; Matter of Furman St., 17 Wend. 667; Goszler v. Georgetown, 6 Wheat. 593; Smith v. Washington, 20 How. U. S. 135; Macy v. City of Indianapolis, 17 Ind. 267; Flagg v. Worcester, 13 Gray, 601; Reynolds v. Shreveport, 13 La. Ann. 426; Rome v. Omberg, 28 Ga. 46; Murphy v. Chicago, 29 Ill. 279; Hume v. Mayor, 1 Hump. (Tenn.) 403; Hovey v. Mayo, 43 Me. 322; Taylor v. St. Louis, 14 Mo. 20; Skinner v. Bridge Co., 29 Conn. 523; Simmons v. Camden, 26 Ark. 276; Dorman v. Jacksonville, 13 Fla. 589; Creal v. Keokuk, 4 G. Green (Ia.), 47; White v. Yazoo, 27 Miss. 357; Keasey v. Louisville, 4 Dana, 154; Alexander v. Milwaukee, 16 Wis.

<sup>2</sup>Cincinnati v. Penny, 21 Ohio St. 499; Meares v. Wilmington, 9 Iredell, 73.

<sup>3</sup>Angell on Highways, section 215; 2 Dillon Municipal Corp. (2d ed.), section 781; Eaton v. R. R. Co., 51 N. H. 504, S. C. 12 Am. Rep. 147; Radcliff's Ex. v. Brooklyn, 4 Comstock, 195. The maxim, if accurately and literally translated, does not justly express the meaning now intended to be conveyed, for that meaning, stated in a rough way, is injury without wrong. The better phrase would be damages without injury, for what is meant is that, although there is loss, there is no legal wrong. Broom's Com. (4th ed.), Chapter III; Smith v. Thackerath, L. R., 1 C. P. 564; Hill v. Bals, 2 H. & N. 299; Cooke v. Waring, 1 H. & C. 332; Sommerville v. Mierhouse, 1 B. & S. 652; Chase-more v. Richards, 1 H. L. Cases, 388.

are considered consequential in such a sense as not to constitute a taking within the meaning of the constitution, can only be satisfactorily ascertained by an examination of the adjudged cases. It is very difficult to discover the line which separates the injuries deemed consequential from those which are adjudged to constitute a taking in a constitutional sense. There are cases, it should, perhaps, be here noted, in which the injuries will constitute a cause of action, but not a taking or appropriation. It is of injuries which are regarded as a taking that we are here speaking; the other class will be considered in another place.

In one case it was held that there was no taking, although the highway was laid out along the line of the party's land, and imposed upon him the burden of maintaining the entire line of fence, whereas, before the opening of the way, the fence was jointly maintained, as a partition fence, by himself and a neighbor.<sup>1</sup> In another case<sup>2</sup> it was held that where land is injured by a change of current, caused by the straightening of a river, no compensation can be recovered for such an injury, and this holding is in harmony with the line of cases which hold that remote consequential injuries from the construction of bridges or dams do not constitute a taking.<sup>3</sup> Where necessity requires the performance of an act for the public good, and the act is performed with due care and skill, and loss results, no compensation can be awarded, unless the damages are the natural and proximate result of the act.<sup>4</sup> Interruption to travel because of the construction and use of a railroad across a highway is *damnum absque injuria*.<sup>5</sup> This is also true where loss results from business competition.<sup>6</sup> An obstruc-

<sup>1</sup> Kennett's Pet., 1 Foster (N. H.), 139. We are inclined to doubt the soundness of this decision.

<sup>2</sup> Green v. Swift, 47 Cal. 536.

<sup>3</sup> Shrunk v. Schuykill, etc., Co., 14 S. & R. 71; Davidson v. Boston, etc., Co., 3 Cush. 91; Com. v. Richter, 1 Pa. 467.

<sup>4</sup> Menken v. City (Ga.), 2 S. E. R. 559. Print Works v. Lawrence, 1 Zab. (N. J.) 257.

<sup>5</sup> Proprietors, etc., Co. v. Nashua, etc., Co., 10 Cush. 385; Ham v. Wisconsin,

etc., Co., 61 Iowa, 716; Matter of New York Central R. R. Co., 77 N. Y. 248; Caledonia Co. v. Ogilvy, 2 Macq. H. L. Cases, 229.

<sup>6</sup> Whittier v. Portland, etc., Co., 38 Me. 26. Some of the cases carry the doctrine very much too far, as it seems to us. Goodbody v. Midland R. R. Co., Irish Reg. Cases, 20; *In re Penny*, 7 El. & Bl. 660; Regina v. Rynd, 1 R. C. L. 29; Chamberlain v. West End R. R. Co., 31 L. J. Q. B. 201.

tion from a bridge built under legislative authority, and with due care and skill, is not such a taking as entitles a riparian proprietor to damages.<sup>1</sup> Mere inconvenience, such as temporary delay, or the loss of time in opening and closing gates, will not warrant an assessment in favor of the land owner.<sup>2</sup> It has also been held that where there is no municipal ordinance requiring the land owner to fence his property along the line of the street, the expense of fencing should not be included in the award.<sup>3</sup>

Where the statute conferring authority to appropriate property under the right of eminent domain designates a time within which claims for compensation must be made, and they are not made within the time prescribed, it will be presumed that they have been paid.<sup>4</sup> It is competent for the legislature to limit the time within which claims for damages shall be filed, and a failure to file them within the time limited is deemed a waiver.<sup>5</sup> The time designated must be a reasonable one and not so short as to deny the property owner fair opportunity to present his claim, but in the absence of a contrary showing, the presumption will be in favor of the act of the legislature. Subject to the limitation that the tribunal appointed to decide upon the question of compensation shall be one possessing judicial functions,

<sup>1</sup> Clark *v.* Saybrook, 21 Conn. 313.

<sup>2</sup> Dudley *v.* Minnesota, etc., Co. (Iowa), 42 N. W. 359.

<sup>3</sup> City of Detroit *v.* Beecher (Mich.), 42 N. W. 986; Bell *v.* Ohio, etc., Co., 25 Pa. St. 161. But see Penna. Co. *v.* Angel, 41 N. J. Eq. 316. For other decisions upon the general subject, see *In re* Public Park, 6 N. Y. S. 750; Hodge *v.* Lehigh, etc., Co., 39 Fed. Rep. 449; Hyland *v.* Short Route, etc., Co. (Ky.), 11 S. W. R. 79; Fulton *v.* Short Route, etc., Co., 85 Ky. 640, S. C. 7 Am. St. R. 619. The Kentucky cases are, as we believe, contrary to the true rule. See Hinchman *v.* Patterson, 17 N. J. Eq. 75, S. C. 86 Am. Dec. 252, and note. See, also, *post* chapter on Railroads in Streets.

<sup>4</sup> Charlestown Brch. R. R. *v.* County Commissioners, 7 Metcf. 78; Rexford *v.* Knight, 11 N. Y. 308; Pittsburgh, etc., Co. *v.* Scott, 1 Pa. St. 309; Nelson *v.* Fleming, 56 Ind. 310; Brookville, etc., Hydraulic Co. *v.* Butler, 91 Ind. 134; Shearer *v.* Commissioners, 13 Kan. 145; Cooley's Const. Lim. (5th ed.), 695; Taylor *v.* Marcy, 25 Ill. 518; Cupp *v.* Board of Commissioners, 19 Ohio St. 173; Reckner *v.* Warner, 22 Ohio St. 275.

<sup>5</sup> McLaughlin *v.* Charlotte R. R., 5 Rich. L. 583; Harper *v.* Richardson, 22 Cal. 251; Goddard *v.* Boston, 20 Pick. 407; Callison *v.* Hedrick, 15 Gratt. 244; Potter *v.* Ames, 43 Cal. 75; Malone *v.* Toledo, 34 Ohio St. 541, 550; State *v.* Messenger, 27 Minn. 119.

the authority of the legislature to prescribe the manner in which the claim shall be filed and the mode of procedure is full and absolute.<sup>1</sup> A claim to compensation once effectually waived or abandoned can not be revived.<sup>2</sup>

The voluntary acceptance of an agreed compensation, or of the sum awarded by the jury or commissioners, will be a waiver of all claims and of all defects or irregularities in the proceedings.<sup>3</sup> If, however, there is a mistake of fact, or if there is fraud, there will be no waiver. The receipt of damages, with full knowledge of all the facts, operates as a confirmation of the proceedings and precludes the land owner from afterwards contesting their validity.<sup>4</sup> The cases go so far as to declare that receipt of compensation will waive defects in the statute itself under which the proceedings were had, and that title passes by force of the statute and payment.<sup>5</sup> It may be true that the owner who voluntarily accepts payment estops himself from questioning the constitutionality of the statute under which the proceedings were had, but where this is the case, it seems to us that the title springs from the consent of the owner to the taking rather than from the invalid statute.<sup>6</sup>

Payment of the compensation, it is said, must be made to the true owner, and there is no doubt that this is the general rule,<sup>6</sup> nor is there doubt as to the application of this rule in ordinary cases, but there may be instances where there is real difficulty. We suppose that a corporation seeking to condemn land may, in the absence of actual notice, treat the person whom the record shows to hold the title as the owner, but where the record discloses the existence of a mortgage it would

<sup>1</sup> *Reckner v. Warner*, 22 Ohio St. 275. 80 Ill. 208; *Hartshorn v. Potroff*, 89

<sup>2</sup> *Null v. Whitewater Canal Co.*, 4 Ill. 509.  
Ind. 431; *Alexander v. Pendleton*, 8 Cranch, 462.

<sup>3</sup> *McGraft v. Brock*, 13 Upper Can. Q. B. 620; *State v. Stanley*, 14 Ind. 409; *Deford v. Mercer*, 24 Ia. 118; *Arnot v. McClure*, 4 Denio, 45; *Striker v. Kelly*, 7 Hill, 9; *Doughty v. Hope*, 3 Denio, 249.

*Com. v. Shuman*, 18 Pa. St. 343, *State v. Stanley*, 14 Ind. 409; *Schatz v. Pfeil*, 56 Wis. 429; *Kile v. Yellowhead*, 509; *Tamm v. Kellogg*, 49 Mo. 118; *Hood v. Finch*, 8 Wis. 381.

<sup>4</sup> *Hawley v. Harrall*, 19 Conn. 142.

<sup>5</sup> *Embury v. Conner*, 3 Comst. 511;

<sup>6</sup> *Missouri, etc., Co. v. Owen*, 8 Kan.

be unsafe to make payment to the mortgagor.<sup>1</sup> It may be said that all who have a proprietary interest in the land are owners within the meaning of the law, and provision must be made for paying such persons according to their interest as it appears of record, or of which actual knowledge is acquired.<sup>2</sup> Where damages are paid to the administrator and by him applied to the payment of the debts of the estate of the decedent, the heirs can not recover without refunding the money so paid.<sup>3</sup> It has been held that the purchaser of land at a sheriff's sale is entitled to the award although he may not receive his deed until after the award is made.<sup>4</sup> Whatever title the party in possession has he must be paid its reasonable value.<sup>5</sup> Where land is owned by infants the compensation must be paid to the guardian duly appointed, and not to the guardian *ad litem*.<sup>6</sup> The compensation for taking land under the right of eminent domain belongs to the person who was the owner at the time,

<sup>1</sup> *Gimbel v. Stolte*, 59 Ind. 446; *Sherwood v. City of Lafayette*, 109 Ind. 411; *Parks v. City of Boston*, 15 Pick. 198; *Ellis v. Welch*, 6 Mass. 246; *Severin v. Cole*, 38 Ia. 463; *Baltimore, etc., Co. v. Thompson*, 10 Md. 76; *Choteau v. Thompson*, 2 Ohio, 114; *Kennedy v. Milwaukee, etc., Co.*, 22 Wis. 581; *Philadelphia, etc., Co. v. Williams*, 54 Pa. St. 103; *In matter of John and Cherry Sts.*, 19 Wend. 659; *Penna. Co. v. Eby*, 107 Pa. St. 166; *Utter v. Richmond*, 112 N. Y. 610. See, however, *Knoll v. New York, etc., Co.*, 121 Pa. St. 467, S. C. 15 Atl. R. 571.

<sup>2</sup> *Turnpike, etc., Co. v. Brosi*, 22 Pa. St. 29; *Gilligan v. Providence*, 11 R. I. 258; *Colcough v. Nashville, etc., Co.*, 2 Head. 171; *Lester v. Lobley*, 7 A. & E. 124; *Dodge v. Omaha, etc., Co.*, 20 Neb. 276; *Wade v. Hennesey*, 55 Vt. 207; *Smith v. Ferris*, 6 Hun. 553; *McIntyre v. Easton, etc., Co.*, 26 N. J. Eq. 425; *State v. Easton, etc., Co.*, 36 N. J.

L. 181; *Gerrard v. Omaha R. R.*, 14 Neb. 270; *Tompkins v. Augusta R. R.*, 21 So. C. 420; *Rentz v. City of Detroit*, 48 Mich. 544; *Hagar v. Brainerd*, 44 Vt. 294; *Astor v. Hoyt*, 5 Wend. 603; *Reed v. Hanover Branch*, 105 Mass. 303; *Booneville v. Ormrod's Adm'r*, 26 Mo. 193; *Shelton v. Derby*, 27 Conn. 414; *Burbridge v. New Albany, etc., Co.*, 9 Ind. 546; *Organ v. Memphis, etc., Co. (Ark.)*, 11 S. W. R. 96; *Lafferty v. Schuylkill, etc., Co.*, 124 Pa. St. 297, S. C. 16 Atl. R. 869; *Mississippi, etc., Co. v. Johnson (Miss.)*, 6 So. R. 190.

<sup>3</sup> *Galveston, etc., Co. v. Blakeney (Tex.)*, 11 S. W. R. 174.

<sup>4</sup> *Penna., etc., Co. v. Cleary*, 125 Pa. 442, S. C. 17 Atl. R. 468.

<sup>5</sup> *Washington, etc., Co. v. Osborne*, 21 Pac. R. 421.

<sup>6</sup> *Brown v. Rome, etc., Co.*, 86 Ala. 206, S. C. 5 So. R. 195.

and it does not pass to his grantee,<sup>1</sup> although it may be assigned.<sup>2</sup> One who acquires an interest in the land after the proceedings are duly commenced, may acquire a right to the proceeds of the award, but he can not, unless he comes in as a party, enforce a claim against the corporation that appropriates the property.<sup>3</sup>

It is generally held that the right to compensation vests as soon as the road or street is finally established, and that the land owner is not bound to wait until the way is opened to travel.<sup>4</sup> If, however, the corporation takes possession of the land condemned or enters upon it, except for some preliminary purpose, the owner is entitled to compensation although the award may not have been confirmed.<sup>5</sup> But the corporation may discontinue the proceedings before final confirmation, and the land owner can not enforce compensation as for a taking, although he may recover damages for any actionable wrong done his property.<sup>6</sup> It has been held that the corporation may abandon the proceeding after possession has been taken, but this seems to us an extreme view.<sup>7</sup>

The right to discontinue proceedings, unless the statute otherwise provides, exists as long as the amount of compensation remains undetermined, except in cases where possession has been taken or the party seeking to condemn property has so

<sup>1</sup> *Drury v. Midland, etc., Co.*, 127 Mass. 571; *Pomeroy v. Chicago, etc., Co.*, 25 Wis. 641; *Church v. Grand Rapids, etc., Co.*, 70 Ind. 161; *Indiana, etc., Co. v. Allen*, 100 Ind. 409; *Midland R. R. Co. v. Smith*, 113 Ind. 233; *Central, etc., Co. v. Merkel*, 32 Tex. 723; *Carli v. Stillwater, etc., Co.*, 16 Minn. 260; *Allyn v. Providence, etc., Co.*, 4 R. I. 457.

<sup>2</sup> *Indiana, etc., Co. v. Allen*, 113 Ind. 308, 311.

<sup>3</sup> *Chicago v. Messler*, 38 Fed. R. 302.

<sup>4</sup> *Shaw v. Charleston*, 3 Allen, 538; *Griggs v. Foote*, 4 Allen, 195; *Philadelphia v. Dickson*, 38 Pa. St. 247; *Garrison v. New York*, 21 Wall. 196; *Hawkins v. Trustees*, 1 Wend. 53; *People v. Gas Light, etc., Co.*, 78 N. Y. 56;

*Chicago v. Barbian*, 80 Ill. 482. See, however, *In re Volkmar St.*, 124 Pa. St. 320, S. C. 16 Atl. R. 807; *City of Portland v. Lee Sam*, 7 Ore. 397; *In re Forbes St.*, 70 Pa. St. 125.

<sup>5</sup> *Johnson v. Alameda*, 14 Cal. 106; *Steuart v. Baltimore*, 7 Md. 500.

<sup>6</sup> *State v. Graves*, 19 Md. 351; *Mallard v. Lafayette*, 5 La. Ann. 112; *Canal St.*, 11 Wend. 155; *Anthony St.*, 20 Wend. 618; *McLaughlin v. Municipality*, 5 La. Ann. 504; *Daley v. St. Paul*, 7 Minn. 390; *Smart v. Portsmouth, etc., Co.*, 20 N. H. 233. See *Philadelphia v. Dickson*, 38 Pa. St. 247, and *Beale v. Penna. Co.*, 86 Pa. St. 509.

<sup>7</sup> *Hullin v. Municipality*, 11 Rob. (La.) 97.

far affirmed the proceedings as to give the owner a right to treat the taking as final. It is evident that a county, township, or municipal corporation ought not to be held bound to take and pay for property required for a road or street until it knows certainly and definitely what it will be compelled to pay for the property. Doubtless it should be required to pay costs and expenses where it discontinues, and probably damages where its acts have caused injury, but it can not, in reason or justice, be compelled to take the property until it is informed what compensation will be exacted, and opportunity is afforded to determine whether the public welfare will justify the expenditure or the treasury will fairly bear the burden. The weight of authority sustains the view we have expressed and it will be found on investigation that much of the apparent conflict is owing to the difference in the statutes under which the cases were decided.<sup>1</sup> It was held in one that where there is a right of appeal the land owner who does appeal can not be dispossessed pending the appeal,<sup>2</sup> but it has also been held that if the money is paid into the court the party seeking to make the seizure may take pos-

<sup>1</sup> *Williams v. New Orleans R. R. Co.*, 60 *Mrs.* 689; *O'Neil v. Freeholders*, 41 *N. J. L.* 161; *Chesapeake, etc., Co. v. Bradford*, 6 *W. Va.* 220; *Corbin v. Cedar Rapids, etc., Co.*, 66 *Ia.* 73; *Graft v. Baltimore*, 10 *Md.* 544; *Black v. Mayor*, 50 *Md.* 235; *Hullin v. Second Municipality*, 11 *Rob. (La.)* 97; *Clarke v. Manchester*, 56 *N. H.* 502; *St. Joseph v. Hamilton*, 43 *Mo.* 282; *Whyte v. City of Kansas*, 22 *Mo. App.* 409; *Dayton, etc., Co. v. Marshall*, 11 *Ohio St.* 497; *Schuylkill, etc., Co. v. Decker*, 2 *Watts*, 343; *Elkhart v. Simonton*, 71 *Ind.* 7; *Chicago, etc., Co. v. Swinney*, 97 *Ind.* 586; *Brokaw v. City of Terre Haute*, 97 *Ind.* 451; *Stiles v. Middlesex*, 8 *Vt.* 436; *Stevens v. Danbury*, 53 *Conn.* 9; *State v. City Council (Minn.)*, 42 *N. W. R.* 355. It has been held that there may be a discontinuance after an appeal has been taken. *Denver v. Lamborn Co.*, 8 *Col.* 380. In another case it was held that the right to dis-

continue existed until the last steps were taken. *Military Parade Ground*, 60 *N. Y.* 319. Some of the courts hold that the question is one within the discretion of the tribunal, and that it may prescribe the terms upon which a discontinuance will be permitted. *Matter of Waverly Water Works Co.*, 85 *N. Y.* 478; *Matter of Water Commissioners of Jersey City*, 31 *N. J. L.* 72. Where the time is limited for objecting or appealing, the party must act within the time prescribed or the property owner may claim the compensation. *People v. Common Council*, 78 *N. Y.* 56; *Crume v. Wilson*, 104 *Ind.* 583; *Pollard v. Moore*, 51 *N. H.* 188.

<sup>2</sup> *Johnson v. Baltimore, etc., Co.*, *N. J.*, 17 *Atl. R.* 574. See *Covington v. Worthington (Ky.)*, 10 *S. W.* 790; *People v. Pitkin County*, 11 *Col.* 147; *S. C.* 17 *Pac. R.* 298; *Faust v. Huntsville*, 83 *Ala.* 279; *S. C.* 3 *So. R.* 771.

session.<sup>1</sup> It was adjudged in a Missouri case that costs upon a discontinuance will include expenses of litigation and attorney's fees.<sup>2</sup> An unreasonable delay in asking to discontinue will defeat the right;<sup>3</sup> and the owner may compel the corporation to elect to take or reject.<sup>4</sup>

It is quite difficult to say what is the measure of damages where there is a discontinuance and loss results to the owner. As much as can be safely said is that the owner is entitled to be reimbursed for all expenses he has been compelled to incur, and for all loss proximately resulting from the acts of the party seeking to condemn the land,<sup>5</sup> but no speculative damages are recoverable, nor, it seems, can there be a recovery for vexation, disquietude or annoyance.<sup>6</sup>

<sup>1</sup> *Ackerman v. Huff*, 71 Texas, 317, S. C. 9 S. W. R. 236; *Chicago, etc., Co. v. Phelps*, 125 Ill. 482, S. C. 17 N. E. R. 269; *Neale v. Superior Court*, 77 Cal. 28, S. C. 18 Pac. R. 790. As to what constitutes a consent, see *Capers v. Augusta, etc., Co.*, 76 Ga. 90.

<sup>2</sup> *North Missouri R. R. v. Lackland*, 25 Mo. 515.

<sup>3</sup> *Baltimore, etc., Co. v. Nesbit*, 10 How. (U. S.) 395; *Stevens v. Danbury*, 53 Conn. 9.

<sup>4</sup> *State v. Cincinnati, etc., Co.*, 17 O. St. 103; *Williams v. New Orleans R. R.*, 60 Miss. 689.

<sup>5</sup> *Drury v. Boston*, 101 Mass. 439; *New Bedford v. Bristol*, 9 Gray, 346; *Gear v. Dubuque, etc., Co.*, 20 Iowa, 523; *Black v. Mayor*, 50 Md. 235; *Van Valkenburg v. Milwaukee*, 43 Wis. 574.

<sup>6</sup> *Whitney v. Lynn*, 122 Mass. 338. The cases upon the subject are in conflict upon some phases of the question, but they substantially agree that some damages are recoverable. Some of the courts restrict the right to recover to costs and outlays for legitimate expenses. *Carson v. City of Hartford*, 48 Conn. 68; *Mallard v. Lafayette*, 5 La. Ann. 112; *McLaughlin v. Municipality*,

5 La. Ann. 504; *Norris v. Mayor*, 44 Md. 598; *Mayor, etc., v. Musgrove*, 48 Md. 272. In *Bergman v. St. Paul, etc., Co.*, 21 Minn. 533, the right to recover counsel fees was denied. For other decisions upon the general subject, see *Leisse et al. v. St. Louis, etc., Co.*, 2 Mo. App. 555, S. C. on appeal, 72 Mo. 561; *Whyte v. City of Kansas*, 22 Mo. App. 409; *Martin v. Mayor*, 1 Hill, 545; *Feiton v. Milwaukee*, 47 Wis. 494. As to the rule where improvements are made after the report and before compensation, the following cases are instructive. *City of Portland v. Sam Lee*, 7 Ore. 397; *Matter of Wall St.*, 17 Barb. 617; *Sherwood v. St. Paul, etc., Co.*, 21 Minn. 122; *State v. Waldron*, 17 N. J. L. 369; *Durier v. Western Union, etc., Co.*, 32 Wis. 569. In *Collins v. Savannah*, 77 Ga. 745, it was held that one who had built, leaving spaces for streets and alleys, had no right of action against the city, because of its failure to open the ways as proposed by an ordinance. We think it quite clear that in the proper case the city might be compelled by mandamus to open streets and alleys, but we suppose it would require a strong case to authorize the courts to interfere.



## CHAPTER XII.

### TRIBUNALS FOR THE ASSESSMENT OF BENEFITS AND DAMAGES.

The duty of ascertaining and awarding benefits and damages is essentially a judicial one, and can not be exercised by officers whose powers are exclusively ministerial or legislative. The legislature itself can not assess benefits and damages for it can not exercise purely judicial powers.<sup>1</sup> Judicial power is not possessed by the legislature and can not be delegated by it. In every instance the constitution vests the judicial power, although in many cases the legislature may create or designate the tribunal which shall exercise the power.<sup>2</sup> The legislature may create the tribunals, except where otherwise provided by the constitution, but they must be judicial in their nature, although the original tribunals need not be courts in the strict sense.

The authority to appoint appraisers, viewers, and the like is generally delegated to the courts, and there is some diversity of opinion upon the question whether the courts can exercise this power. It is assumed by some of the authorities that the power of appointment is not a judicial one, and hence, it is reasoned, that, as courts can only exercise judicial power, they can not make appointments. It is true that courts can only be invested with judicial power,<sup>3</sup> and it is also true that the power of appointment is one of an executive character,<sup>4</sup> but while

<sup>1</sup>Greenough v. Greenough, 11 Pa. St. 489; Missouri Tel. Co. v. National Bank, 74 Ill. 217; Turner v. Althouse, 6 Neb. 54; Perkins v. Corbin, 45 Ala. 103; Smith v. Myers, 109 Ind. 1.

<sup>2</sup>People v. Maynard, 14 Ill. 419; Smythe v. Boswell, 117 Ind. 365; State v. Noble, 118 Ind. 350, 367. Judicial power vested by the constitution can

not be lodged elsewhere. *In re Cleveland* (N. J.), 17 Atl. R. 772.

<sup>3</sup>Heyburn's Case, 2 Dallas, 409, n; U. S. v. Fererira, 13 How. 40, n; *Ex parte Griffiths*, 118 Ind. 83; *Coley's Principles of Const. Law*, 53.

<sup>4</sup>Taylor v. Com., 3 J. J. Marsh. 401; State v. Barbour, 53 Conn. 76; Achley's Case, 4 Abbott's Pr. Rep. 35.

this is true, it is not true that the power of appointment is invariably or exclusively an executive or a legislative one.

In many cases the power is a judicial one, as in the case of referees, receivers, administrators, guardians and the like, and is possessed by the judiciary as one of the indispensable incidents of its departmental sovereignty.<sup>1</sup> In assuming, as we do, that appraisers, viewers and assessors may be appointed by the court, we do no more than give effect to a long existing rule, and one that is founded on sound principle.<sup>2</sup> It is no doubt true that courts can only exercise the appointing power in cases where the duties of the persons appointed are judicial in their nature, or are in a material manner connected with judicial proceedings. If the duties of the position to which the person is appointed are not judicial and are not connected with judicial proceedings, then the judiciary can not rightfully exercise a general appointing power since it can not be invested with any other than judicial powers.<sup>3</sup>

It has been held that the legislature may establish a public road without submitting the question to any judicial tribunal, and a distinction is made between the establishment of a road and the assessment of benefits and damages.<sup>4</sup> It was also held in the same case, that the legislature may designate a special tribunal to assess the damages in the particular instance. We very much doubt the soundness of this decision where, as in the jurisdiction in which it was made, there is a constitutional provision prohibiting the enactment of special laws, but we have no doubt that the legislature may, in the absence of re-

<sup>1</sup> *State v. Noble et al.*, 118 Ind. 350; *Striker v. Kelley*, 2 Denio, 323; *In re Cooper*, 22 N. Y. 67. practical exposition given to the constitution.

<sup>2</sup> We do not affirm that courts may appoint an entirely distinct and independent tribunal, but what we mean is that they may appoint persons to discharge duties of a *quasi* judicial nature, in matters of which the courts may have general jurisdiction. From the earliest to the latest cases the power of the courts to appoint has been recognized, and if there ever had been doubt upon this question it is removed by the

<sup>3</sup> *Smith v. Strother*, 68 Cal. 194; *In re School Manual*, 63 N. H. 574; *Gould v. Raymond*, 59 N. H. 260; *Doe v. Considine*, 6 Wall. 458.

<sup>4</sup> *The State v. Board*, 28 Kan. 431. It is, indeed, doubtful whether the court is not in error in holding that the legislature had the power to establish the road and compel the county to pay for it. *Hogland v. Sacramento*, 52 Cal. 142; *State v. Hampton*, 13 Nev. 439.

strictive constitutional provisions, designate the tribunal which shall assess benefits and damages in a particular class of cases.

The character of the tribunal, and the manner in which its members shall be selected, is a matter to be determined by the legislature, except where the constitution directs how the tribunal shall be selected and what its character shall be. Broad as the legislative power is, it is not unlimited, for the legislature can not strip the property owner of his right to have the matter submitted to a tribunal of a judicial nature. Limited as may be the jurisdiction of the tribunal, it must still be so far invested with judicial power as to be able to fairly hear and impartially decide the question submitted to it. A statute assuming to fetter the tribunal so that it can not exercise an impartial judgment upon a fair hearing can not stand, for it is not within the power of the legislature to require the question to be submitted to a body destitute of the essential characteristics of a judicial tribunal. It is not enough that the land owner be afforded an opportunity to be heard; he must be given that opportunity in a tribunal that has power to hear and determine the controversy.<sup>1</sup>

The power to determine the necessity for seizing the property of the citizen is legislative, but the power to determine what loss results to the owner from its seizure is judicial, and under our American constitutions, as we have said, the legislature can not exercise judicial functions. The doctrine of some of the courts and text writers<sup>2</sup> can not be upheld without a plain violation of fundamental principles, for if it be granted that the compensation need not be determined by a judicial tribunal in proceedings of an adversary character, then it must follow that the legislature can itself fix the compensation, and this is a conclu-

<sup>1</sup> *Rich v. Chicago*, 59 Ill. 286; *Ames v. Lake Sup., etc.*, 21 Minn. 241; *People v. Kniskern*, 54 N. Y. 52; *Powers Appeal*, 29 Mich. 504. The legislature can not make arbitrary rules, nor burden the land owner with unjust restrictions. *State v. Sewer Com'rs*, 39 N. J. L. 667; *Davis v. Howell*, 47 N. J. L. 280; *State v. Perth Amboy*, 18 Atl. 670.

<sup>2</sup> *Mills Eminent Domain*, section 84;

*Bonaparte v. Camden, etc., Co.*, Baldwin, 205. The case of *People v. Smith*, 21 N. Y. 595, does not support the doctrine asserted by the author referred to, for that case clearly recognizes a different doctrine as it makes a distinction between proceedings to determine the necessity for taking and proceedings to determine the right to compensation.

sion interdicted by principle and by the decided weight of authority.

It is in the discretion of the legislature to directly declare the necessity for the taking, or it may delegate the power of determining that question to appropriate instrumentalities of government.<sup>1</sup> Where the constitution of the State requires all acts to be general, the attempt to make provision by a special act would, as we have indicated, be fruitless, but where there is no such constitutional provision special acts are valid. An act is general which confers the right upon all persons, and enables all to take advantage of its provisions upon equal terms, so that where a right is given the inhabitants of all corporations of a similar character to take advantage of the provisions of the statute, it is not in conflict with the constitution.<sup>2</sup>

It is the duty of the legislature to take measures to provide a tribunal for assessing benefits and damages, although the appointment of the members of the tribunal may be conferred upon the courts. If no provision is made by statute for such a tribunal, no appropriation of the land can be made.<sup>3</sup> Where there is no constitutional limitation upon the power of the legislature to select the tribunal, then it may prescribe the number and qualification of its members. Where, however, the constitution prescribes the character of the tribunal or the qualification of its members, the legislature must provide for such a tribunal as the constitution requires. It is not essential that

<sup>1</sup> Backus v. Lebanon, 11 N. H. 25; Pratt v. Brown, 3 Wis. 603, Anderson v. Turbeville, 6 Coldw. 150; Smeaton v. Martin, 57 Wis. 364; State v. Shawnee Comm'rs, 28 Kan. 431. But unless there is a tribunal of a judicial character, there can not be due process of law under the Fourteenth Amendment to the Federal constitution, nor within the meaning of State constitutions when justly construed.

<sup>2</sup> Robinson v. Schenck, 102 Ind. 307, and authorities cited; Cooley Const. Lim. (5th ed.) 148.

<sup>3</sup> Allen v. Jones, 47 Ind. 442; Ames

v. Lake Superior, etc., Co., 21 Minn. 241; Penna. R. R. Co. v. Heister, 8 Barr. 445; 2 Kent's Com. 339, n. Tribunals not established by law can have no legal existence, and proceedings before a tribunal usurping jurisdiction not legally conferred are, in the strictest sense, *coram non jndice*. Great as is the legislative power, it is not great enough to authorize the seizure of private property without the intervention of the judiciary. The judicial intervention is a useful and effective check, and serves both to protect private property and advance public interests.

provision be made for a jury, but provision must be made for some tribunal of a judicial character.<sup>1</sup> The land owner is not always entitled to a jury as a matter of right, but where the constitution provides that the damages shall be assessed by a jury, a statute providing for an assessment by a different tribunal will be void. Where a jury is required by the constitution and there are no explanatory words, it is held to require a jury of twelve men, for the general rule is that the word jury means the tribunal established by the common law.<sup>2</sup> Where a jury is required, it is essential that the land owner be given an opportunity to examine and challenge the jurors.<sup>3</sup> Where there is a right of appeal and an opportunity for a final trial, it is clear upon principle, and it is so held by the better reasoned cases, that the doctrine declared by the authorities last cited can not prevail, for it is sufficient that the right to a jury trial with its ordinary incidents be provided for on an appeal from the judgment of the tribunal appointed to assess the benefits and damages.<sup>4</sup> The preliminary hearing is one thing, the final decision quite another.

The constitution, justly interpreted, requires that the question of compensation shall be determined by an impartial tribunal. It is not competent for the legislature to provide that the property shall be paid for at prices stated in a schedule engrafted on the statute.<sup>5</sup> Nor is it competent for the legislature to provide that the compensation may be fixed by the corporation seeking to condemn the land, nor that it be fixed by an agent or officer

<sup>1</sup>Charles River Bridge v. Warren River Bridge, 11 Peters, 420, S. C. 7 Pick. 344; Rich v. Chicago, 59 Ill. 293; Cook v. South Park, 61 Ill. 115; Ames v. Lake Sup., etc., Co., 21 Minn. 241; Van Horn's Lessee v. Dorrance, 2 Dall. 304; Langford v. Com., 16 Minn. 375; San Francisco v. Scott, 4 Cal. 114; Lumsden v. Milwaukee, 8 Wis. 485.

<sup>2</sup>Lamb v. Lane, 4 Ohio St. 167; Cooley's Const. Lim. (4th ed.) 394; 2 Dillon's Municipal Corp., section 618.

<sup>3</sup>People v. Tallman, 36 Barb. 222; Booneville v. Ormrod, 26 Mo. 193;

Heyneman v. Blake, 19 Cal. 579; Cooley's Const. Lim. (4th ed.) 704.

<sup>4</sup>Lamb v. Lane, 4 Ohio St. 167; Wells v. Co. Road, 7 Ohio St. 16; Cairo, etc., R. R. Co. v. Trout, 32 Ark. 17; Bass v. City of Ft. Wayne (Ind.), 23 N. E. 259; Maxwell v. Board, 119 Ind. 20; Reckner v. Warner, 22 Ohio St. 275; Hapgood v. Doherty, 8 Gray, 373; Flint River Co. v. Foster, 5 Ga. 194; Steuart v. Mayor, 7 Md. 500.

<sup>5</sup>Cunningham v. Campbell, 33 Ga. 625; Cox v. Cummings, 33 Ga. 549; Kramer v. Cleveland, 5 Ohio St. 140.

of such corporation.<sup>1</sup> It has, however, been held, that where there is a right of appeal, or where there is authority in the court to review the proceedings, the common council of a city seeking to appropriate the land may appoint the commissioners to appraise the benefits and damages.<sup>2</sup> In such cases, however, the statute must not give the corporation greater privileges or advantages than those awarded the land owner.<sup>3</sup> It is not competent for the legislature to invest the common council of a municipal corporation with authority to assess compensation to an owner whose land is seized for a street.<sup>4</sup>

While it is essential that an impartial tribunal shall be provided for the assessment of benefits and damages, the character of the tribunal, except in cases where the constitution designates it, or otherwise limits the legislative power, may be determined and prescribed by the legislature. It is not necessary that the members of the tribunal should be selected from citizens of the county.<sup>5</sup> Where the statute requires that the appraisers, viewers, commissioners, or surveyors, shall possess designated qualifications, as that they shall be freeholders or the like, they must be selected from persons possessing such qualifications. If one of the persons selected is directly interested in the opening of the proposed street or road he should be deemed disqualified on the elementary principle that no man can be a judge in his own case,<sup>6</sup> but a mere general interest as that of an inhabitant of a town, city, or county, should not be

<sup>1</sup> *Powers v. Bears*, 12 Wis. 214; *Hessler v. Drainage Com.*, 53 Ill. 105. That an impartial tribunal shall be provided is, as we have indicated, required by the Fourteenth Amendment to the Federal constitution, but much is yet left to the judgment of the State legislature as to the character of the preliminary tribunal and the mode of procedure.

<sup>2</sup> *McMicken v. Cincinnati*, 4 Ohio St. 394; *Bass v. City of Ft. Wayne (Ind.)*, 23 N. E. R. 259; *Maynes v. Moore*, 16 Ind. 116; *Flournay v. City*, 17 Ind. 169.

<sup>3</sup> *Paul v. Detroit*, 32 Mich. 108.

<sup>4</sup> *Lumsden v. Milwaukee*, 8 Wis. 485.

<sup>5</sup> *People v. Lake*, 33 Cal. 487.

<sup>6</sup> *Gilsey v. Cincinnati, etc.*, R. R., 4 Ohio St. 308; *Lexington v. Long*, 31 Mo. 369; *Foot v. Stiles*, 57 N. Y. 399; *Readington v. Dilly*, 24 N. J. L. 209; *Menges v. Albany*, 56 N. Y. 374; *Clifford v. Com.*, 59 Me. 262; *State v. Delsedenier*, 11 Me. 473; *State v. Crane*, 36 N. J. L. 394; *Friend Appellant*, 53 Me. 387; *Rock Island R. R. v. Lynch*, 23 Ill. 597; *High v. Ditching Association*, 44 Ind. 356; *Taylor v. Comm'rs*, 105 Mass. 225.

deemed to render him incompetent.<sup>1</sup> Where the fact which disqualifies an appraiser, commissioner, or viewer is known to the party, he should seasonably object, for if he proceeds without making the objection, he will be deemed to have waived it.<sup>2</sup>

In almost all of the States the original proceedings are had before local tribunals, as boards of supervisors, boards of commissioners, county judges, and common councils, but whatever may be the title of the tribunal upon which the authority to direct the opening of streets and roads is conferred, its authority is, in such matters, of a judicial nature.<sup>3</sup> These tribunals are not always, in the strict sense of the term, courts, but when acting in the matter of opening streets and roads they are engaged in the exercise of judicial functions. Boards of county commissioners and boards of supervisors are, when engaged in hearing controversies respecting the opening of roads and streets, regarded as courts of limited statutory jurisdiction.<sup>4</sup> Such boards possess power of a judicial nature and also administrative and ministerial powers,<sup>5</sup> but in hearing highway cases they exercise judicial functions.

It is essential to the validity of these proceedings that the tribunal before which they are prosecuted should have jurisdiction both of the subject-matter and of the persons of those whose land is sought to be appropriated. There is some diversity of opinion, but the weight of authority is that the jurisdiction must

<sup>1</sup> *State v. Crane*, 36 N. J. L. 394; *City of Minneapolis v. Wilkin*, 30 Minn. 140; *Bradley v. Frankfort*, 99 Ind. 417; *Bass v. City of Ft. Wayne (Ind.)*, 23 N. E. R. 259; *Chase v. Rutland*, 47 Vt. 393.

<sup>2</sup> *Towns v. Stoddard*, 300 N. H. 23; *Ipswich v. Essex*, 10 Pick. 519; *Groton v. Hurlburt*, 22 Conn. 178.

<sup>3</sup> *State v. Richmond*, 6 Foster (N. H.), 235; *State v. Macdonald*, 26 Minn. 445, 449. In *Matter of Canal Street*, 11 Wend. 154.

<sup>4</sup> *Doctor v. Hartman*, 74 Ind. 221; *White v. Conover*, 5 Blackf. 462; *Board v. State*, 61 Ind. 75; *Stone v. Augusta*, 46 Me. 127. See, also, *Chicago, etc., R.*

*Co. v. Chamberlain*, 84 Ill. 333; *Northern P. T. Co. v. Portland*, 14 Ore. 24. A jury of inquest is not a court. *Grand Rapids, etc. Co. v. Chesebro (Mich.)*, 42 N. W. R. 66.

<sup>5</sup> *Platter v. Board*, 2 N. E. Rep. 544, S. C. 103 Ind. 360; *Perrine v. Farr*, 2 Zab. (N. J.) 356; *Paul v. Hussy*, 35 Me. 97; *Shue v. Com.*, 41 Mich. 638; *Milton v. Com.*, 40 Mich. 229; *Harrington v. People*, 6 Barb. 611; *Turner v. Stanton*, 42 Mich. 506; *Adney v. Vernon*, 3 Lev. 243; *Grunon v. Raymond*, 1 Conn. 40; *Mills v. Martin*, 19 Johns. 34; *Morgan v. Dyer*, 10 Ind. 163; *Morrow v. Weed*, 4 Ia. 77.

appear on the face of the record, and there are some cases that go so far as to hold that the presumption is against jurisdiction unless the face of the record discloses facts which confer jurisdiction.<sup>1</sup> It is, however, generally agreed that if the record affirmatively shows jurisdiction then the same presumptions will be indulged in favor of the proceedings as are indulged in favor of proceedings in courts of general jurisdiction.<sup>2</sup> The judgment of an inferior court upon jurisdictional facts is generally regarded as conclusive, and where there is a judgment necessarily affirming that jurisdiction exists, and this judgment could not have been pronounced without passing upon jurisdictional facts, it will be conclusive as against all collateral attacks.<sup>3</sup> It is not necessary that there should be a formal judgment expressly affirming that jurisdiction exists, nor is it necessary that there should be an express finding of jurisdictional facts, for it is enough if the judgment impliedly asserts the existence of jurisdiction.<sup>4</sup>

The inferior courts, to which original jurisdiction over high-

<sup>1</sup>Thatcher v. Powell, 6 Wheat. 119; Dykman v. Mayor, 5 N. Y. 434; Smith v. Rice, 11 Mass. 506; Schell v. Leland, 45 Mo. 289; Central R. R. Co's Appeal, 102 Pa. St. 38. As holding a somewhat different doctrine see, Elliott v. Peirsol, 1 Peters, 328; Barney v. Saunders, 16 How. 535; McPherson v. Culliff, 11 S. & R. 442; Wright v. Marsh, 2 G. Greene, 95; Markle v. Board, 46 Ind. 96; State v. Shreeve, 3 Gr. (N. J.) 57; Robinson v. Mathwick, 5 Neb. 255.

<sup>2</sup>Haskell v. Haven, 3 Pick. 404; Baker v. Runnels, 3 Fair (Me.), 235; Merritt v. Baldwin, 6 Wis. 439; Com. v. Brown, 123 Mass. 410; Lawson on Presumptive Ev. 34; Reeves v. Townsend, 2 Zab. 396; Morrow v. Weed, 4 Clarke (Ia.), 77; Fox v. Hoyt, 12 Conn. 491; Wilson v. Wilson, 18 Ala. 176. See, also, Tucker v. Harris, 13 Ga. 1, S. C. 58 Am. Dec. 488; Roderigas v. East River Institute, 63 N. Y. 460, S. C. 20 Am. Rep. 555; Wells v.

Stevens, 2 Gray, 115; Steen v. Bennett, 24 Vt. 303; C. B. & Q. R. R. v. Chamberlain, 84 Ill. 333; State v. Hinchman, 27 Pa. S. 479; Reid v. Spoon, 66 N. C. 415; Comstock v. Crawford, 3 Wall. 396.

<sup>3</sup>Porter v. Stout, 73 Ind. 3; Roderigas v. East River Institute, 63 N. Y. 460, S. C. 20 Am. Rep. 555; Grignon's Lessee v. Astor, 2 How. (U. S.) 319; Porter v. Purdy, 29 N. Y. 106; Evansville v. City of Evansville, 15 Ind. 395; Knox Co. v. Aspinwall, 21 How. 539; Bissell v. City, 24 How. 299; Town v. Eaves, 92 U. S. 484; Com. v. Bolles, 94 U. S. 104; Potter's Dwarries' Statute 299; C. B. & Q. R. R. Co. v. Chamberlain, 84 Ill. 335.

<sup>4</sup>Hall v. Board, 70 Ind. 469; Cauldwell v. Curry, 93 Ind. 363; Platter v. Board, 103 Ind. 360, S. C. 2 N. E. Rep. 544; Henline v. People, 81 Ill. 269; People v. Heddon, 32 Hun. (N. Y.) 299; Matter of Highway, 3 Harr. 291.



way cases is ordinarily delegated, must proceed in accordance with the provisions of the statute, for they have no such comprehensive general inherent powers as are vested in the superior courts of general jurisdiction. The general rule, as usually stated, is, that courts of inferior jurisdiction have only such authority as the statute confers upon them.<sup>1</sup> This statement of the rule is, perhaps, narrower than, in strictness, it should be, for there are incidental powers necessarily inherent in every judicial tribunal, whether it be a court of general jurisdiction or one of inferior jurisdiction. The creation of a court, or the investment of a tribunal with powers of a judicial nature, necessarily carries such incidental powers as are essential to enable the tribunal to proceed in accordance with the general rules of law. This is true so far as the rules of evidence and matters of a similar character are concerned, unless the statute makes express provisions upon the subject.<sup>2</sup> Where the statute makes provision for the method of procedure, that method should be pursued, but after jurisdiction has once attached a departure from the method prescribed will not always render the proceedings void, although there may be cases where the act done in violation of the statute will vitiate the proceedings.<sup>3</sup>

The rule that the provisions of the statute must be pursued is applied with much strictness in cases where there is a direct attack upon the proceedings, and it is held that a departure from the statute in any substantial particular will render the

<sup>1</sup> *Edmondson v. Kite*, 43 Mo. 176; *Woods v. Boots*, 60 Mo. 546; *White v. Conover*, 5 Blackf. 462; *Mossman v. Forrest*, 27 Ind. 233; *Freeman on Judgments*, section 517, *et seq.* Subject to constitutional restrictions, the power of the legislature over the procedure, and as to the organization of tribunals, is very broad and comprehensive. *State v. Rapp* (Minn.), 38 N. W. R. 926.

<sup>2</sup> *Jones v. Goffstown*, 39 N. H. 254; *Albany, etc., Co. v. Lansing*, 16 Barb. 68.

<sup>3</sup> *Inhabitants v. County Comm'rs*, 8 Cush. 546; *White v. Conover*, 5 Blackf. 462; *Ellis v. Jones*, 51 Mo. 180. Ord-

narily, the only questions submitted to commissioners or viewers are those of location and damages, but it is competent to submit other questions to them. *De Buorel v. Freeport, etc., Co.*, 111 Ill. 499; *Petition of Landaff*, 34 N. H. 163; *Central Pacific R. R. Co. v. Pearson*, 35 Cal. 247. They have no right to adjudicate upon questions not submitted to them by the statute. *State v. Bailly*, 6 Wis. 291; *Schroeder v. Detroit*, 44 Mich. 387; *Forbes v. Delschmitt*, 68 Ia. 164; *Matter of Girard Avenue*, 11 Phila. 449; *Wilcox v. Oakland*, 49 Cal. 29.

proceedings ineffective. There is, however, a material difference between proceedings void for want of jurisdiction and proceedings erroneous because of a departure from the provisions of the statute or the general rules of law.<sup>1</sup> Much confusion has been produced by employing the word "void" in a loose sense and assigning it a meaning equivalent to voidable. The truth is, sound principle requires that it should be held that no proceeding shall be deemed void where there is jurisdiction of the subject-matter and the person; such proceedings may be erroneous, and may be avoided by an appeal or some other direct attack, but, in a just sense, they are not void. Where there is jurisdiction, the judgment of the tribunal is not void, unless it is one which it was beyond the power of the tribunal to render. Jurisdiction does not, however, authorize a judgment wholly beyond the power of the tribunal even in courts of superior jurisdiction.<sup>2</sup>

An inferior court can not rightfully do any act not authorized, either expressly or impliedly, by statute, but jurisdiction is not always ousted by an order or ruling not authorized by law. It may be that the act, or order, will be treated as of no effect, and that the judgment, so far as it is within the statutory powers, will be upheld. Thus, a justice of the peace has no power to vacate a judgment except in the manner provided by statute, but the vacation of the judgment does not oust jurisdiction, for the judgment remains unaffected by the unauthorized effort to vacate it.<sup>3</sup> There are cases, however, holding that an act performed in violation of the provisions of the statute will vitiate the entire proceedings, as, for instance, passing petitions over

<sup>1</sup> *Grignon's Lessee v. Astor*, 2 How. 319, *McPherson v. Cunliff*, 11 S. & R. 422, *Reeves v. Townsend*, 2 Zab. 396; *Clark v. Holmes*, 1 Doug. 390; *Rowland v. Veale*, 1 Cowp. 19; *Dempster v. Purnell*, 3 M. & G. 375.

<sup>2</sup> *Gusett v. Howard*, 10 Q. B. 352; *McVeigh v. U. S.*, 11 Wall. 259; *Windsor v. McVeigh*, 93 U. S. 274; *Henry v. Carson*, 96 Ind. 412, *Strosser v. City*, 100 Ind. 443, p. 446.

<sup>3</sup> *Foist v. Coppin*, 35 Ind. 471, *Smith*

*v. Chandler*, 13 Ind. 513, and see *Crandall v. Bacon*, 20 Wis. 639. Where the statute does not give jurisdiction, the consent of the land owner can not confer it. *State v. New York, etc., Co.* (N. J.), 16 Atl. R. 188. Ordinarily, the statutory tribunal has no authority to consider the question of the right to damages for a trespass outside of the proposed right of way. *Bridges v. Dill*, 97 N. C. 222, S. C. 1 S. E. R. 767.

to a time beyond that limited by law, or postponing a hearing where no such power is conferred, or making an order not within the scope of the powers granted by statute.<sup>1</sup> Where there is a final order disposing of the proceedings pending before an inferior court, it can not resume jurisdiction, nor can it review its final judgments.<sup>2</sup> There are cases in which powers conferred upon a board of commissioners, or tribunals of a like character, are in their nature continuing, and, in such cases, the power is not exhausted by a single exercise, but, where the power is granted for a special purpose, and can only be exercised in a particular case, it is exhausted, so far as concerns the particular case, by a single exercise.<sup>3</sup> This principle applies to proceedings in highway cases, and where there is a final order or judgment terminating the proceedings, jurisdiction of the same proceeding can not be resumed, for, if the jurisdiction of the particular case is once abandoned, lost or ousted, it can not be again assumed.

There is some conflict in the authorities as to whether the failure of the inferior tribunal to act upon a petition for a highway, and at the time designated by statute, will or will not oust the jurisdiction.<sup>4</sup> The sound doctrine upon this subject, as it seems to us, is this: If the parties are once properly in court, then the failure to take action at the proper time will not oust the jurisdiction, although it may constitute error reviewable by *certiorari* or on appeal. This is in harmony with the general principle that where jurisdiction has once attached it is not lost

<sup>1</sup> *Brown v. Kellogg*, 17 Wis. 475; *Roberts v. Warren*, 37 Wis. 737; *Crandall v. Bacon*, 20 Wis. 639; *Inhabitants v. County Comm'rs*, 59 Me. 391; *State v. Castle*, 44 Wis. 670; *Inhabitants of Braintree v. County, etc.*, 8 Cush. 546; *Doctor v. Hartman*, 74 Ind. 221; *City v. Bearss*, 55 Ind. 576.

<sup>2</sup> *Doctor v. Hartman*, 74 Ind. 221; *Board v. State*, 61 Ind. 75; *Board v. Logansport, etc., Co.*, 88 Ind. 199; *Matter of Highway*, 3 Harr. (N. J.) 290, 293.

<sup>3</sup> *Platter v. Board*, 2 N. E. Rep. 544, S. C. 103 Ind. 360.

<sup>4</sup> *Huntress v. Effingham*, 17 N. H. 584; *Inhabitants, etc., v. Commissioners*, 59 Me. 391; *Allison v. Com.*, 54 Ill. 172; *Kidder v. Peoria*, 29 Ill. 77; *State v. Castle*, 44 Wis. 670. It is clear, however, that where commissioners meet pursuant to notice, and then without making any order or adjourning to any future day, afterwards meet after the expiration of the time fixed by statute, and without further notice, proceed to establish a highway, such action or order will be set aside on *certiorari* or appeal. *Wood v. Comm'rs*, 62 Ill. 391.

by an error committed in the course of the proceedings.<sup>1</sup> The general rule unquestionably is that when jurisdiction is acquired, the order or judgment is not void, although it may be erroneous.<sup>2</sup> An exception to this general rule may, perhaps, be found in those cases which hold that where there is such an excess of power as makes part of the proceedings void, unless the illegal act can be separated from the legal one all are void. Where the notice is required to designate the time and place for the meeting of the court, and is the first notice given in the case, then there must be a meeting at the time and place appointed, or there will be no jurisdiction.<sup>3</sup> The rule does not apply to tribunals holding continuous or regular terms, for in such cases the failure to take action at the time designated would not oust jurisdiction and require a new petition, although it would require a new notice. Where the proceedings are of an adversary character, as in highway cases, the notice should appoint a time for hearing at a regular and not at a special term. Boards of commissioners, boards of supervisors, selectmen and similar tribunals may properly transact ordinary ministerial business at special terms, but they can not, as a general rule, hear and determine cases of a judicial character at special terms.<sup>4</sup> If, however, the hearing is entered upon at the term at which parties are notified to appear, then adjournments may be made unless forbidden by statute.<sup>5</sup>

<sup>1</sup> *Little v. Thompson*, 24 Ind. 146; C., B. & Q. R. R. Co. v. Chamberlain, 84 Ill. 333, opin. 344.

<sup>2</sup> *Willard v. City of Boston* (Mass.), 21 N. E. R. 298; *Crise v. Auditor*, 17 Ark. 572; *Baker v. Winaham*, 25 Conn. 597; *Baily v. McCain*, 92 Ill. 277; *Sunier v. Miller*, 105 Ind. 393; *State v. Kinney*, 39 Ia. 226; *Comm'rs v. Erspen*, 12 Kan. 531; *True v. Freeman*, 64 Me. 573; *Brimmer v. Boston*, 102 Mass. 19; *Clark v. Drain Comm'rs*, 50 Mich. 618; *Wyatt v. Thomas*, 29 Mo. 23; *State v. Rye*, 35 N. H. 368; *State v. Trenton*, 36 N. J. L. 198; *People v. Thayer*, 63 N. Y. 348; *Beebee v. Scheidt*, 13 Ohio St. 406.

<sup>3</sup> *Hobbs v. Board*, 103 Ind. 575.

<sup>4</sup> *Platter v. Board*, 2 N. E. Rep. 544, S. C. 103 Ind. 360. Where the law fixes no time and place for meeting, it should be at the time and place fixed in the notice. *State v. Scott*, 9 N. J. L. 17; *Roberts v. Williams*, 13 Ark. 355.

<sup>5</sup> *Wood v. Comm'rs*, 62 Ill. 391; *Goodwin v. Weathersfield*, 43 Conn. 437; *Polly v. Saratoga, etc., Co.*, 9 Barb. 449; *State v. Vanbuskirk*, 21 N. J. L. 86; *Ruhland v. Supervisors*, 55 Wis. 664. Parties duly before the tribunal must take notice of regular adjournments. *Board v. Magoon*, 109 Ill. 142.

The jurisdiction essential to give validity to the proceedings must be of the particular case and of the parties to that case. It is not enough that there is general jurisdiction of the subject-matter. In order that jurisdiction of the particular case may be acquired, there must be a substantial compliance with the requirements of the statute. The preliminary facts essential to jurisdiction must exist, or the proceedings will be ineffectual. If the preliminary facts are sufficient to authorize the tribunal to proceed in the matter there is jurisdiction, and, although subsequent errors and irregularities may intervene, the proceedings will be valid until avoided by appeal or *certiorari*.<sup>1</sup> Where the statute expressly requires that the petition or application shall state facts essential to the existence of jurisdiction in the particular case, these facts must appear or the proceedings will be void.<sup>2</sup> This rule, however, applies only to jurisdictional facts which the petition or application is required to set forth; the omission to state facts essential to the sufficiency of the petition will render it bad if directly attacked, but such an omission will not make the proceedings void.<sup>3</sup>

There is a well known distinction between jurisdiction of the subject-matter and jurisdiction of the person. It is indispensably necessary to the validity of a judgment that the court should have jurisdiction of the subject-matter, for in the absence of this jurisdiction the judgment is absolutely void. Jurisdiction of the subject-matter can only come from the law, but jurisdiction of the parties may be given by consent.<sup>4</sup> If there is no jurisdiction of the subject-matter the court, upon discovering

<sup>1</sup> *Morrow v. Weed*, 4 Clarke (Ia.), 77, 89; 1 *Smith's Lead. Cas.*, note, 837, 843; *C. B. & Q. R. R. Co. v. Chamberlain*, 84 Ill. 333. Kreuter, 100 Ind. 27; *Thayer v. Burger*, 100 Ind. 262; *Town v. Williamson*, 91 Ind. 541.

<sup>2</sup> *People v. Whitney*, 32 Hun. (N. Y.) 508. In all cases where private property is seized, there must be jurisdiction, but it is not always true that all jurisdictional facts must appear at full length on the face of the record.

<sup>3</sup> *State v. Barlow*, 61 Iowa, 572; *Sutherland v. Holmes*, 78 Mo. 399; *State v. Brands*, 45 N. J. L. 332; *Conway v. Asherman*, 94 Ind. 187; *Forsythe v. Lynn*, 2 How. 43; *Folger v. Columbia*, etc., Co., 99 Mass. 267; *In re College St.*, 11 R. I. 472; *Davis v. Davis*, 36 Ind. 16c.

<sup>4</sup> *Hervey v. Edmunds*, 68 N. C. 243; *Greer v. Cagle*, 84 N. C. 385; *Wilson v. Zeigler*, 44 Texas, 657; *Iowa, etc., Co. v. Ritter*, 36 Iowa, 586; *Doty v. Brown*, 4 How. 429; *Stoughton v. Mott*, 13 Vt. 175; *Thatcher v. Powell*, 6 Wheat. 119; *Shriver's Lessees v. Lynn*, 2 How. 43; *Folger v. Columbia*, etc., Co., 99 Mass. 267; *In re College St.*, 11 R. I. 472; *Davis v. Davis*, 36 Ind. 16c.

that fact, should, of its own motion, dismiss the proceedings.<sup>1</sup> Courts of general jurisdiction may decide that they have jurisdiction of the person, and, although this decision may be wrong, yet, if there are any jurisdictional facts, invoking a decision, the judgment can not be collaterally impeached, but no court can decide that it has jurisdiction of cases over which jurisdiction is expressly conferred upon another tribunal.<sup>2</sup> To illustrate, suppose it is provided that the circuit court shall have exclusive jurisdiction of criminal offences, it is quite clear that the common pleas, or superior court, could not render a valid judgment in a criminal prosecution. Or, to further illustrate, suppose exclusive jurisdiction is conferred upon probate courts over the subject of decedents' estates, it is clear that no other court could assume jurisdiction. There must, therefore, be cases in which the judgment of the court that it has jurisdiction is null, and in all such cases the judgment may be collaterally impeached. Where there is no jurisdiction of the subject-matter there can be no valid decision of any question. The rule that where there is no jurisdiction of the subject-matter the judgment is void, is easily stated, but not always easily applied. The difficulty is to determine what shall be considered the subject-matter, for all agree that where there is no jurisdiction of the subject-matter there can be no judgment, but in applying the rule there is much diversity of opinion.<sup>3</sup>

We are bold enough to suggest that much of the confusion and conflict that exists is attributable to an unfortunate choice of terms. The subject, or, as it is generally denominated, the

<sup>1</sup> *Canaan v. Reynolds*, 5 Ellis & B. 301; *Coleman's Appeal*, 75 Pa. St. 441; *Crane v. Barry*, 47 Ga. 476; *State v. The Whitewater, etc., Co.*, 8 Ind. 320; *Doctor v. Hartman*, 74 Ind. 221.

<sup>2</sup> *Strosser v. City*, 100 Ind. 443.

<sup>3</sup> *Williamson v. Berry*, 8 How. 495; *Campbell v. Brown*, 6 How. (Miss.) 106; *Gwinn v. McCarroll*, 1 S. & M. 251; *Shaefer v. Gates*, 2 B. Monroe, 453; *Bloom v. Burdick*, 1 Hill, 130; *Hollingsworth v. Barbour*, 4 Peters, 466; *Dermerit v. Lyford*, 27 N. H. 541;

*Ferguson v. Crawford*, 70 N. Y. 253; *Moore v. Starks*, 1 Ohio St. 369; *Boden v. Fitch*, 15 Johns. 121; *Sears v. Terry*, 26 Conn. 273; *Balch v. Shaw*, 7 Cush. 282; *Ex parte Watkins*, 3 Pet. 193; *Borden v. State*, 6 Eng. 519; *Cox v. Thomas*, 9 Gratt. 323; *Weeden v. Town Council*, 9 R. I. 131; *Fisher v. Hamden*, 1 Paine C. C. 58; *Collamer v. Paige*, 35 Vt. 387; *Mora v. Kuzac*, 21 La. Ann. 754; *Rose v. Himely*, 4 Cranch. 276; *De Quindre v. Williams*, 31 Ind. 444.

subject-matter, of the action can, in strictness, only mean the subject of the particular controversy, while the subject of the court's jurisdiction is an essentially different thing.<sup>1</sup> The subject of the court's jurisdiction means the classes of controversies over which it is by law invested with authority. The subject-matter of the action is properly the thing, right, property, or matter involved in the particular instance, but the subject of the court's jurisdiction is much broader. The court may have general jurisdiction of a subject and yet no right to exercise it in the particular instance. Thus, the subject of a court's jurisdiction may extend to all controversies involving the title to land, and this would include all actions to recover real property, while the subject of an action may be a particular parcel of land claimed by the litigants in the particular case. The error of many of the authorities consists in confusing a particular thing with a general class of things. In this a plain logical principle is violated, for one instance can not make a general rule, nor one thing take the place of a class. The courts which proceed upon the theory we have ventured to disapprove have, as we believe, departed from principle, and if they carry the doctrine to its logical result it is impossible for them to stop short of the conclusion that in all cases the validity of a judgment may be collaterally impeached, for in all cases jurisdiction is, under the American system, conferred by statute. The creation of a superior court undoubtedly invests it with inherent judicial powers which the legislature can not control; but in all cases where the constitution does not prescribe the jurisdiction, the legislature may declare of what subjects and of what classes of controversies the tribunal shall have jurisdiction. Almost all of our courts are statutory, and whether the statute invests a board of commissioners with exclusive original jurisdiction of a general class of cases or invests such jurisdiction in a circuit or common pleas court, can make no difference, for the authority is purely statutory, and the jurisdiction of the tribunal is as broad as the statute and no broader, no matter upon what tribunal it is conferred.

While it is true that the judicial power is vested by the con-

<sup>1</sup>Jackson v. Smith (Ind.), 22 N. E. R. 431.

stitution, yet it is also true that with the legislature rests the right and duty of designating the tribunals which shall exercise this power, as well as that of regulating the mode of its exercise, except, of course, where the subject is controlled by constitutional provisions. The legislative authority is very broad, and when it is enacted that a tribunal shall have exclusive original jurisdiction over a class of legal controversies, then there is in the tribunal a general jurisdiction over the class designated, and all that is necessary in the particular instance is to ascertain and decide whether the particular thing or matter in dispute, and the parties interested in the dispute, are within the jurisdiction of the tribunal. The law confers jurisdiction over the general class, and the subject-matter of the court's jurisdiction is ascertained from the law, but its authority to proceed in the particular instance is determined by an investigation of the facts in the particular case. The subject-matter of the court's jurisdiction is a designated class of controversies, not a particular controversy, and whether it shall proceed in a particular controversy belonging to the general class depends upon its decision of the question of its right to assume jurisdiction, and if it has authority to determine this question, and the case is a member of the general class, then its judgment is not void.<sup>1</sup> Whenever the claim or contention takes such a form that the tribunal can act upon it there is jurisdiction.<sup>2</sup> Where there is rightful authority to decide any question within the limits of the subject over which the statute confers jurisdiction, the decision is effective as against a collateral attack, for the power of the tribunal is brought into action.<sup>3</sup>

The distinction between the subject-matter of a court's jurisdiction and the subject of a particular action, which we have endeavored to establish, is an important one in highway cases. The statutes of many of the States confer upon courts of infer-

<sup>1</sup> *State of Rhode Island v. State of Massachusetts*, 12 Peters, 657; *Voorhees v. Bank*, 10 Peters, 449; *Elliott v. Piersol*, 1 Peters, 328; *Bush v. Hanson*, 70 Ill. 480; *Schoeder v. Merchants Ins. Co.*, 104 Ill. 71; *Lantz v. Moffett*, 102 Ind. 23; *Board v. Markle*, 46 Ind. 96.

<sup>2</sup> *Smith v. Adams*, 130 U. S. 167.

<sup>3</sup> *United States v. Arredon*, 6 Pet. 709; *Cornett v. Williams*, 20 Wall. 226; *In re White*, 17 Fed. R. 724; *In re Bogart*, 2 Sawyer, 396.



ior jurisdiction exclusive original jurisdiction over the subject of public roads, and thus confer jurisdiction of a general subject. There is, therefore, jurisdiction of the class of proceedings and consequently jurisdiction of the subject-matter. Where the record shows that the proceeding belongs to the class over which the statute has conferred jurisdiction, it shows jurisdiction of the subject. It shows jurisdiction to decide, although it may not show jurisdiction of the particular controversy. Where there is jurisdiction of the subject-matter, the court possessing that jurisdiction must, it seems to us, necessarily have authority to decide that it may rightfully proceed in the particular instance in which its jurisdiction is invoked. If it has authority to decide upon its right to proceed, then that decision must be final, except when directly assailed. It is difficult to perceive any ground for holding otherwise. There is, in such a case, general authority over a class of cases, and if there are facts requiring a decision upon a question before the court in a particular case, and if there must be a decision, surely that decision can not be deemed null, even if founded on a mistaken view of the law. Erroneous it may be, but not void. If there is a decision upon any question it should be respected, provided there are facts upon which the court can act. There is, therefore, strong reason for affirming, as a learned lawyer has affirmed, that: "There is nothing absurd or illogical in holding that a body of limited powers may determine whether the questions which are brought before it admit of the exercise of its powers. If limitation of power necessarily excluded the right of ultimate decision, nothing could be decided finally under governments, which, like those of this country, are throughout and without exception limited."<sup>1</sup> All tribunals are in some degree limited, but this does not take from them the power of deciding in any case where there is conferred upon them a right to hear and investigate, and that right is invoked by some appropriate petition and notice, even though in both application and notice there may be some defects. If once the legal machinery is set in motion in a matter in which it may move at all, the result is not entirely devoid of force,

<sup>1</sup> Smith's Leading Cases, 1116.

although if proper objection is taken and an appropriate attack is made, the result may be set aside as erroneous.<sup>1</sup>

If there is no application or petition, order or ordinance, and no notice, then, of course, the power of the tribunal is not invoked and the machinery of the law is not put in motion. If there is no beginning there can be no effective result, nor, indeed, can there be any valid step taken. If, however, the case is within the scope of the court's jurisdiction of the subject, and it is called upon to decide whether it shall proceed in the particular instance, its decision, although it may be wrong, can not be absolutely void. If there is no jurisdiction of the general subject upon which the court assumes to act, then there is no right to make any decision, intermediate or final, and the entire proceeding is *coram non judice*; but if the tribunal is invested by law with original jurisdiction of a subject, as, for instance, that of laying out and opening highways, or of establishing and constructing drains, these matters are within the scope of the subject of the court's jurisdiction, and its decisions are not necessarily void, although the decision upon the question of the right to proceed may be erroneous.<sup>2</sup>

The persons composing the tribunal appointed to make an assessment of benefits and damages should take the proper oath before entering upon their duties. The failure to take the necessary oath is generally considered as a matter affecting the jurisdiction, and it is held that it is such an irregularity as will destroy the validity of their report upon a motion to quash.<sup>3</sup> A

<sup>1</sup> If the hand that touches the machinery can put it in motion, then it has power, and if it has, there is something more than a mere nullity.

<sup>2</sup> *Mankin v. State*, 2 Swan (Tenn.), 206; *Stanley v. Sharp*, 1 Heisk. 417; *Beard v. Justices*, 3 Head. 97; *Evans v. Phillips*, 3 Head. 70; *McWhirter v. Cockerill*, 2 Head. 9; *Jackson v. Ashton*, 10 Peters, 480; *Coolman v. Fleming*, 82 Ind. 117; *Argo v. Barthand*, 80 Ind. 63; *Simonton v. Hays*, 88 Ind. 70.

<sup>3</sup> *Frith v. Justice*, 30 Ga. 723; *Keenan v. Com'rs Court*, 26 Ala. 568; *Fisher v. Smith*, 5 Leigh. 611; *Crossett v. Owens*, 110 Ill. 378; *Walters v. Houck*, 7 Ia. 72; *Harper v. Lexington, etc., Co.*, 2 Dana (Ky.), 227; *Spring v. Lowell*, 1 Mass. 422; *Bowler v. Drain Com'rs*, 47 Mich. 154; *Matter of Public Road*, 4 N. J. L. 396; *State v. Lawrence*, 5 N. J. L. 850; *Cambria Street*, 75 Pa. St. 357; *Lyman v. Burlington*, 22 Vt. 131; *Bohlman v. Green Bay, etc., Co.*, 40 Wis. 157; *State v. Northrop*, 18 N. J. L. 271; *Low v. Galena R. R. Co.*, 18 Ill. 324. In *Lumsden v. Milwaukee*, 8 Wis. 485, the rule was carried very far, for it was there held that although the statute did not require an oath to

want of power in the officer who assumes to administer the oath will not make the proceedings invalid.<sup>1</sup> If it is known to a party, either from facts actually communicated to him, or from information supplied by the record, that the commissioners have not been sworn, he must make a seasonable objection, or the irregularity will be deemed waived.<sup>2</sup> In the absence of a statutory provision empowering a majority of the appraisers or commissioners to hear and determine the case, all must be present at the hearing, but it is held that a majority may make the report of the award.<sup>3</sup> The common law rule in such cases is that all the commissioners must take part in the proceedings,

be taken, still the failure to take an oath rendered the proceedings void. But in *Bradstreet v. Erskine*, 50 Me. 407, this doctrine was denied. It is somewhat difficult to perceive any solid ground for holding that the failure to take an oath renders the proceedings void. It is held, as the authorities cited in a note to a subsequent page show, that the failure to object cures the error, and yet if it is jurisdictional, this can hardly be true, for a defect affecting the jurisdiction of the subject-matter can not be waived. Possibly the ruling may be right where the commissioners, viewers or committee are not required to report to any court or tribunal, but we can not believe in can be correct in a case where the case can be tried *de novo* on appeal. *Black v. Thompson*, 107 Ind. 162; *Raymond v. Com'rs*, 63 Me. 110. It may be an error entitling the land owner to a *certiorari* or to a correction on a direct attack, but we do not see how it can be justly considered such a defect as would render a corporation entering under the award liable as a trespasser, or liable in an action of ejectment. Notwithstanding the great array of cases, we venture to say that where there is a supervising tribunal, the failure of viewers or commissioners to take the requisite oath does not render the proceedings void.

<sup>1</sup> *Woolsey v. Hamilton*, 32 Ia. 130. Some of the cases go so far as to declare that a report will be set aside for mere verbal inaccuracies in the oath. *State v. Barnes*, 13 N. J. L. 268; *State v. Davis*, 13 N. J. L. 10; *Hoagland v. Culvert*, 20 N. J. L. 387. But this doctrine is denied, and as it seems to us with good reason. *New Orleans, etc., Co. v. Hemphill*, 35 Miss. 17.

<sup>2</sup> *Wentworth v. Farmington*, 51 N. H. 128; *Goodwin v. Milton*, 25 N. H. 458; *Towns v. Stoddard*, 30 N. H. 23; *Roberts v. Williams*, 13 Ark. 355; *State v. Horn*, 34 Kan. 556; *Hobbs v. Board*, 103 Ind. 575; *Barlow v. Highway Commissioners*, 59 Mich. 443; *In re Johnson*, 49 N. J. L. 381; *Commissioners v. Harper*, 38 Ill. 103; *Wood v. Comm'rs*, 62 Ill. 391.

<sup>3</sup> *Board v. Lansing*, 45 N. Y. 19; *Woolsey v. Tompkins*, 23 Wend. 324; *Fourth Avenue*, 11 Abb. Pr. 189; *Plymouth Co. v. Commissioner*, 16 Gray, 146; *Van Steenburgh v. Bigelow*, 3 Wend. 42; *Rogers, Ex parte*, 7 Cowen, 526; *Baltimore Turnpike*, 5 Binn. 481; *Hall v. People*, 57 Ill. 307; *Young v. Buckingham*, 5 Ohio, 485; *McLellan v. Com.*, 21 Me. 390. This ruling rests upon the principle that the majority of a quorum may act. *Rushville, etc., v. City of Rushville (Ind.)*, 23 N. E. R. 72.

but this rule has been changed by statute in most of the States. There is some diversity of opinion as to whether the failure of one of the commissioners to act shall be deemed to constitute a mere irregularity or to be such a defect as ousts the jurisdiction, but the opinion finding the strongest support in principle is that jurisdiction having once attached is not ousted by such an irregularity.<sup>1</sup> Where jurisdiction is acquired the fact that errors are committed does not oust it, although the errors may be sufficient to vitiate the proceedings in a direct attack.<sup>2</sup>

The tribunal designated by law to hear and determine proceedings in condemnation cases does not act as the agent of the county, town, or city of which it is the representative or governing body.<sup>3</sup> It is invested by law with functions of a judicial nature, and in exercising such functions it can not create a liability against the public corporation. In legal contemplation it is an independent tribunal, and in determining controversies concerning the right to appropriate property and the assessment of benefits and damages, it does not act in a representative capacity. A tribunal invested with such functions may be compelled by mandamus to perform its duties, and it can not be heard to aver that its proceedings have not been regular in order to defeat a contractor.<sup>4</sup>

<sup>1</sup> *Quayles v. Missouri, etc., R. R. Co.*, 63 Mo. 465; *Austin v. Helms*, 65 N. C. 560; *Hays v. Parrish*, 52 Ind. 132.

<sup>2</sup> *Osborn v. Sutton*, 108 Ind. 443; *Black v. Thomson*, 107 Ind. 162.

<sup>3</sup> *Board v. Fullen*, 111 Ind. 410.

<sup>4</sup> *Wren v. City*, 96 Ind. 206; *City v. Moore*, 113 Ind. 597.

## CHAPTER XIII.

### PARTIES TO PROCEEDINGS TO ESTABLISH ROADS AND STREETS.

It is essential that persons who have interests directly affected by proceedings in highway cases should, in some appropriate method, be made parties to the proceedings. Where there are substantial rights in property the owners of those rights should, in accordance with a fundamental principle underlying all proceedings of a judicial character, have their "day in court." This can only be accomplished by making them parties to the proceedings. It is difficult to perceive how a person can be justly said to have his "day in court," unless he is in some way made a party to the proceeding instituted for the purpose of taking his property from him, or of laying a burden upon it in the form of a special assessment.<sup>1</sup> On principle it would seem quite clear that all persons whose substantial rights are affected by the proceedings should be named in the petition or application, or in some mode brought before the tribunal as parties. The same rule, however, must apply here as in ordi-

<sup>1</sup> A statute which does not give the property owner a reasonable legal opportunity for contesting the question of his right to damages and the amount thereof has been held to violate the constitutional provision inasmuch as it does not provide "due process of law." *Kingston v. Towle*, 48 N. H. 57. A hearing and an opportunity to be heard are essential to the validity of a statute. *Stuart v. Palmer*, 74 N. Y. 190; *People v. O'Brien*, 111 N. Y. 1; 2 *Lawyers R. Anno.* 268. See, also, *Shove v. Manitowoc*, 57 Wis. 5; *Philadelphia v. Miller*, 49 Pa. St. 448; *Harwood v. North Brookfield*, 130 Mass. 561; *Lehman v.*

*Robinson*, 59 Ala. 244. Provision should be made in the statute for a hearing. *State v. Lindell Hotel Co.*, 9 Mo. App. 455; *South Platte Land Co. v. Buffalo County*, 7 Neb. 256. *Kuntz v. Sumption*, 117 Ind. 1; *Stuart v. Palmer*, *supra*; *Bennett v. City of Buffalo*, 17 N. Y. 383. Instructive and interesting discussions of the question, what constitutes due process of law, will be found in the cases of *State v. Ryan*, 70 Wis. 676; *Portland v. Bangor*, 65 Me. 120; *Underwood v. People*, 32 Mich. 1; *In re Michael Gannon (R. I.)*, 5 *Lawyers Rep. Anno.* 359.

nary cases, and only such persons as appear of record at the time the proceedings are commenced need be made parties. Latent equities, or interests not disclosed by the public records, need not be noticed. Any other rule would make it impossible to secure a valid judgment, since the petitioners can not have any other knowledge of the rights and interests of parties than such as is imparted by the record. If a person acquires an interest after the commencement of the proceedings, he should be regarded as a purchaser pending the litigation, and bound by the judgment in which it results. Although proceedings to establish a highway must be conducted in substantial compliance with the provisions of the statute, still, the statute is to be taken as a part of one great body of law, and general principles are not to be excluded unless the rigor of the words of the statute requires it. It is practically impossible to embody in one statute all the rules that shall govern a special proceeding, nor would any beneficial result be secured by attempting to do so, and we must, therefore, look to the general principles of the law in construing statutes and in carrying their provisions into execution.

A proceeding to establish a highway, and to appropriate property for that purpose, can not be justly considered an *ex parte* proceeding, although expressions are found in the decided cases which seem to give it that character. It is essentially an adversary proceeding, since it requires both a plaintiff and a defendant.<sup>1</sup> Statutes authorizing such proceedings are not to be construed strictly because the proceeding is in the nature of an *ex parte* one, but because such statutes are in derogation of common right. In truth, a statute attempting to make such a proceeding an *ex parte* one would be in conflict with the constitution, for the reason that, in an *ex parte* proceeding, there can be no due process of law within the meaning of the constitution. As the proceeding is, and must be,

<sup>1</sup> We can not conceive how it can be possible that a citizen's property can be appropriated in a purely *ex parte* proceeding, for there is no due process of law. Where there are no individual citizens or private corporations prosecuting the application, the government itself or the political subdivision occupies substantially the position of a plaintiff.

an adversary one, it is indispensably necessary that the proper parties should be brought before the court. It is but just that all who have substantial rights disclosed by the public records should be made parties to the proceedings, and, in order to effect this purpose, statutes should be so construed as to require all who have such interests to be made parties. It is, indeed, not within the power of the legislature to deprive one who has an estate in real property of the right to contest the effort to take it from him or burden it with a lien, no matter by whom the effort is made. Where, however, the interest in the property is in the form of a lien created solely by statute, then the legislature may provide for seizing the property without requiring the lien-holder to be made a party. It is upon this principle that it is held that judgment creditors need not be made parties unless the statute so provides.<sup>1</sup> The lien of a judgment does not create an estate in land, but is a security given by law to the creditor, and, as the cases generally hold, is a lien that may be taken away by law at any time before vested rights have accrued.<sup>2</sup> It is, indeed, considered as part of the remedy, and as falling within the rule that it is competent for the legislature to change the form of the remedy, although it is difficult to perceive any just principle upon which some of the extreme cases upon the question of the right to change the remedy can rest.<sup>3</sup> But we need not enter upon any discussion as to the general power to change the lien of a judgment, for we think that the power to exercise the right of eminent domain without making judgment creditors parties may be rested on the broad ground that the lien is subsidiary to this sovereign right, and that, as no property or estate of the lien-holder is taken, he is not within the provisions of the constitution. The judgment creditor has no proprietary interest in the land, but all his interest is a mere lien created by statute, and this lien is subordinate to the provisions of the statutes enacted for the purpose

<sup>1</sup> *Watson v. N. Y., etc., R. R.*, 47 N. 276; *Watson v. N. Y. Central R. R.*, 47 N. Y. 157; *Gimbel v. Stolte*, 59 Ind. 446.

<sup>2</sup> *Fisher v. Lacky*, 6 Blackf. 373; *Col. 100*; *Cooley Const. Lim.* (5th ed.) 34, auth. n.

<sup>3</sup> *Gunn v. Barry*, 15 Wall. 610.

of carrying into execution the sovereign power of eminent domain.

The word "owners" is generally employed in the statutes as describing the persons who must be made parties to proceedings to establish roads or streets. In order to carry into effect the purpose of the statute and to give just force to the provisions of the constitution, the term "owners" should be construed to mean all who have an estate in the land and whose interests appear of record. This would require that all who have vested estates should be made parties, but would not apply to those who have mere liens or inchoate interests. Under the operation of the rule it would not be necessary to make a married woman having an inchoate interest in the lands of her husband a party to the proceeding.<sup>1</sup> The principle upon which the doctrine that a wife need not be made a party rests, is, that the right to dower, or to an estate in the lands of the husband, is a right created by law and not by contract, and that it is not vested until the death of the husband. During his life he is regarded as the owner and it is sufficient if he is made a party to the proceedings. Where there is a vested estate, the owner should be a party, whether his estate is in remainder or reversion, or is a present estate.<sup>2</sup> There seems to be some conflict in the authorities upon the question whether a tenant is to be regarded as within the meaning of the term "owner," but in our opinion there can be no just ground for holding that he is not the owner of an estate in the land. The sound doctrine

<sup>1</sup> *Duncan v. City*, 85 Ind. 104; *City v. Kingsbury*, 101 Ind. 200, p. 220; *Gwynne v. City*, 3 Ohio, 24, S. C. 17 Am. Dec. 576; *Moore v. Mayor*, 4 Sandf. 456, S. C. 8 N. Y. 110, *Jackson v. Edwards*, 7 Paige, 386; 1 Wash. R. P. (4th ed.) 269; *Scribner on Dower*, 550 to 555; 1 *Dillon Municipal Corp.* (2d ed.), section 459.

<sup>2</sup> *State v. Easton, etc., R. W. Co.*, 36 N. J. L. 181; *Parks v. City*, 15 Pick. 198; *Enfield Toll Bridge Co. v. Hartford, etc., R. R. Co.*, 17 Conn. 454; *Shelton v. Derby*, 27 Conn. 414; *Columbia, etc., Co. v. Geisse*, 35 N. J. L. 558; *New Orleans R. R. v. Frederic*, 46 Miss. 1; *Booneville v. Ormrod's Est.*, 26 Mo. 193; *Harrisburg v. Crangle*, 3 Watts. & S. 460; *Passmore v. Philadelphia R. R.*, 9 Phila. 579; *Colcough v. Nashville R. R.*, 2 Head. 171; *Burbridge v. New Albany etc., R. R.*, 9 Ind. 546; *Gerrard v. Omaha, etc., R. R. Co.*, 14 Neb. 270, S. C. 20 Am. & Eng. R. R. Cas. 423. See, also, as to partners owning partnership land, *Whitman v. Boston, etc., R. R. Co.*, 3 Allen (85 Mass.), 133.



is that, where the record discloses his interest, he should be made a party to the proceedings, for he is the owner of some estate in the land, and whether this estate is great or small must depend upon the term for which the lands are demised to him.<sup>1</sup> There are some cases holding that a purchaser not having received the title to the land is to be deemed an owner,<sup>2</sup> but if these cases are to be considered as going to the extent of declaring that such a purchaser is an owner in such a sense as to require that he be made a party to the proceedings they can not, in our opinion, be sustained. Doubtless such a purchaser might, in the proper case, by an intervening petition protect his rights, or secure the award of damages to the extent of his interest, but he can not be deemed an owner in such a sense as to entitle him to avoid the proceedings on the ground that he was not made a party.<sup>3</sup> To hold that a person with an unrecorded title must be made a party would make it almost, if not quite, impossible, to conduct the proceedings so that rights could be acquired under them, for of such titles the record gives no notice. Such a holding would also be contrary to the general doctrine that the holder of the legal title, as it appears of record, is the proper party. It is under this general doctrine that it is held that the trustee, and not the beneficiary, should

<sup>1</sup> Turnpike Road *v.* Brosi, 22 Pa. St. 29; Brown *v.* Powell, 25 Ia. 229; Baltimore, etc., Co. *v.* Thompson, 10 Md. 76; Parks *v.* City of Boston, 15 Pick. 198; Schoff *v.* Improvement Co., 57 N. H. 110, see p. 113; Gilligan *v.* Aldermen, 11 R. I. 258; Astor *v.* Miller, 2 Paige, 68, S. C. 5 Wend. 603; Erie, etc., Co. *v.* Brown, 1 Casey, 156; South Devon R. W., case of, 7 Eng. L. & E. 139; Reed *v.* Hanover Branch R. R., 105 Mass. 303; Town of Storm Lake *v.* Iowa Falls, etc., Co., 62 Ia. 218. Tenants in common should be made parties. Grand Rapids, etc., R. R. Co. *v.* Alley, 34 Mich. 16, 18; but compare Bowman *v.* Venice, etc., R. R. Co., 102 Ill. 459, where this was held unnecessary, as the rights of one did not depend on the dis-

position of the case as to the others.

<sup>2</sup> St. Louis, etc., Co. *v.* Wilder, 17 Kan. 239.

<sup>3</sup> Smith *v.* Ferris, 6 Hun. (N. Y.) 553; Tasker *v.* Small, 7 L. J. (Ch.) 19; Bird *v.* Great Eastern R. R., 34 L. J. (C. P.) 366; Wiley *v.* South Eastern R. R., 18 L. J. (Ch.) 201. See, also, Brown *v.* Co. Comm'rs, 12 Metc. (53 Mass.) 208. It would be proper to admit one who acquires a title after the proceedings are begun, or who holds by an unrecorded deed, to come in and defend, but it would not be incumbent on the petitioners to make such a person a party. Bell *v.* Cox (Ind.), 23 N. E. R. 705; Stewart *v.* White (Mo.), 11 S. W. R. 568.

be made a party.<sup>1</sup> Mortgagees are deemed necessary parties to proceedings in highway cases,<sup>2</sup> and this general doctrine extends to mortgagees of leasehold estates.<sup>3</sup> Where there are heirs of a deceased person they, and not the administrator, should be made parties.<sup>4</sup> If the statute provides that the names of the owners shall be given as they appear on the last tax duplicate, or on the entry book, it will be sufficient to thus describe them, though the description on the duplicate, or entry book, be to the heirs of the estate of a person named as deceased.<sup>5</sup> There are cases in which the administrator of the estate of a former owner may be entitled to the damages,<sup>6</sup> but he is not the owner of the land, and consequently is not the proper party to the proceedings. The question as to who is entitled to the proceeds of the award, the heirs or the administrator, is not to be settled by the petitioners for the highway, for the law only requires of them that they shall make the owners of the lands parties. If the proceedings have been commenced before the death of the owner, and notice has been served, then the proceedings may be revived as against the heirs,<sup>7</sup> but if there has

<sup>1</sup>State *v.* Orange, 32 N. J. L. 49; State *v.* Easton, etc., Co., 36 N. J. L. 181; Davis *v.* Charles River Branch R. R., 11 Cush. 506; Hawkins *v.* County Commissioners, 2 Allen, 254.

<sup>2</sup>Sherwood *v.* City, 109 Ind. 411; Parks *v.* City, 15 Pick. 198; Baltimore, etc., Co. *v.* Thompson, 10 Md. 76; Philadelphia, etc., Co. *v.* Williams, 54 Pa. St. 103; In the Matter of John and Cherry Streets, 19 Wend. 659; Cool *v.* Crommet, 13 Me. 250; Platt *v.* Bright, 29 N. J. Eq. 128; Parker's Case, 36 N. H. 84; Wilson *v.* European, etc., R'y Co., 67 Me. 358; Severin *v.* Cole, 38 Ia. 463; Kennedy *v.* Milwaukee, etc., R. R., 22 Wis. 581. But see as to mortgagors in possession, Whiting *v.* New Haven, 7 Reporter, 42; Parish *v.* Gilmanton, 11 N. H. 293.

<sup>3</sup>Hagar *v.* Brainard, 44 Vt. 294; As-tor *v.* Hoyt, 5 Wend. 603.

<sup>4</sup>Booneville *v.* Ormrod, 26 Mo. 193; Boynton *v.* Peterborough R. R., 4 Cush. 467; Todemier *v.* Aspinwall, 43 Ill. 401; Neal *v.* Knox, etc., R. R. Co., 61 Me. 298. See Peoria, etc., R. R. Co. *v.* Rice, 75 Ill. 329.

<sup>5</sup>Carr *v.* Cottingham, 103 Ind. 548. But otherwise, where the statute requires that the *names* should be given. State, Combs, *et al.* *v.* Blauvelt, 33 N. J. L. 36; Lull *v.* Curry, 10 Mich. 397.

<sup>6</sup>Rush *v.* McDermott, 50 Cal. 471; Goodwin *v.* Milton, 25 N. H. 458; St. Albans *v.* Seymour, 41 Vt. 579; Neal *v.* Knox R. R., 61 Me. 298; Welles *v.* Cowes, 4 Conn. 182; Hotchkiss *v.* Auburn R. R., 36 Barb. 600.

<sup>7</sup>Peoria R. R. *v.* Rice, 75 Ill. 329; Satterfield *v.* Crow, 8 B. Monr. 553; Valley R. R. Co. *v.* Bohm, 29 Ohio St. 633.

been a final order or judgment there is no necessity for a revivor.<sup>1</sup>

Where there is a mere lien on the land not disclosed by record, or evidenced by a legal or equitable mortgage, the holder of the lien is not an owner within the meaning of the statute. It is essential that there be more than a mere security for a debt; there must be a proprietary interest in the land itself. A vendor of land holding the legal title, although in equity he may be regarded as holding it for the benefit of the vendee who has paid the purchase money, is the owner of the land and he should be made a party to the proceeding.<sup>2</sup> If the vendor has invested the vendee with the legal title, then the latter is to be regarded as the owner, although the former may hold an unrecorded vendor's lien.<sup>3</sup> A factor who has advanced money on property has a lien on the property to secure the sum advanced, but he has not such a proprietary interest as constitutes him an owner.<sup>4</sup>

There are exceptions to the general rule that it is only persons who have title of record that must be made parties to the proceedings. If the facts are such as to impart notice that the person in possession has a proprietary claim to the land or color of title, then he should be made a party.<sup>5</sup> The test as to who are necessary parties should be that of notice. If there is record notice, and there are no facts countervailing the effect of that notice, then only those who have titles of record should be deemed necessary parties, but if there are facts which would inform a prudent person making reasonable inquiry that the owner of the ostensible record title is not the real owner or does

<sup>1</sup> If the land has been taken during the owner's life, and the compensation unpaid, it is generally payable to the administrator. *Wells v. Cowles*, 4 Conn. 182, S. C. 10 Am. Dec. 115; *Neal v. Knox*, etc., R. R. Co., 61 Me. 298.

<sup>2</sup> *Smith v. Ferris*, 6 Hun. N. Y. 553. It has been held that notice to the owner is not notice to his vendee, who purchases pending the proceedings. *Curran v. Shattuck*, 24 Cal. 427.

<sup>3</sup> See *Elizabethtown*, etc., R. R. Co. v. *Helm's Heirs*, 8 Bush. (Ky.) 682.

<sup>4</sup> *United States v. Villalonga*, 23 Wall. 35; *Smith v. Race*, 76 Ill. 490.

<sup>5</sup> *Stoneman v. London*, etc., Co., 7 L. R. Q. B. 1; *Lexington*, etc., Turnpike Road Co. v. *McMurtry*, 3 B. Monr. 516. *Anderson v. Pemberton*, 89 Mo. 61. See, also, *Mo.*, etc., G. R. R. Co. v. *Owen*, 8 Kan. 409; *Sherwood v. St. Paul*, etc., R. R. Co., 21 Minn. 127, S. C. 11 Am. Ry. Rep. 370, to the effect that possession and use are *prima facie* evidence of ownership.

not own the whole estate, then the notice imparted by these facts should be acted upon, and the real owner and all having a rightful proprietary interest in the land or actually occupying under color of such an interest should be made parties. This rule would protect the petitioners against secret claims and equities of which they could have no knowledge, and yet secure a day in court to those who, having no record title in the land, have performed such acts and taken such positions as to convey actual notice of their interest in the land which it is proposed to seize. So, too, it would impose upon the petitioners the duty of exercising ordinary diligence and vigilance, and yet not require them to use extraordinary diligence and care.

Persons having rights in the land may be admitted as parties under the general rules of law, even though the statute may not expressly authorize the admission of new parties. Ordinarily a statute does not, and can not, stand alone, forming in itself a complete system, but it is part of one great system and intimately blended with the fundamental rules and principles of that system. Yet the right to come in and be heard upon the question of the right to seize the property, and the matter of the measure of compensation, does not imply that disputes between rival claimants must be adjusted in the proceedings to establish the highway. If there are rival claimants the money can be paid into court,<sup>1</sup> and in a proper suit the respective rights of claimants adjudicated. Nor does the right of claimants to be admitted to defend imply that the petitioners are bound to make them parties; this the former may elect to do, but they are under no obligation to do it.

Where it is proposed to compel the land owners to pay the cost of opening and constructing a road or street, justice requires that in some appropriate method they should be made parties to the proceedings. It is not merely those whose property is taken that are entitled to be treated as parties, for those whose property is to be made to bear the burden are, of right, entitled to be dealt with as parties, and as such they must be before the

<sup>1</sup> See *San Francisco, etc., R.R. Co. v. Sugar, etc., Co.* 57 Wis. 311; *Bell v. Mahoney*, 29 Cal. 112; *South Park Cox (Ind.)*, 23 N. E. R. 705. *Com'rs v. Todd*, 112 Ill. 379; *Wooster*

court.. It is not always necessary that they should be formally named as parties, but in some legal method they must be placed in such a situation as will secure them the substantial rights of parties in an adversary proceeding. Where the statute prescribes the mode of procedure that, of course, will govern, but if there is no express provision upon the subject, then they must be made parties under the general rules of law. It is not necessary, except where the statute so requires, and except where a specific assessment is to be laid on the land, to describe the land which will be affected by the opening of a road or street, for if the general direction and character of the way is shown by the record, enough is shown to inform those made parties of the nature of the proceeding.<sup>1</sup> It is not always necessary that a land owner against whom it is proposed to assess benefits should have notice of the preparatory proceedings, but it is necessary that he should be in court as a party before the final determination of the question.<sup>2</sup> That an interested person is in court as a witness is not sufficient, for he must be there as a party,<sup>3</sup> although the fact that he is in court and thus obtains knowledge of the proceedings may often form an important element in an equitable estoppel. It is not essential that a land owner should be in court upon questions which the local authorities have a right to conclusively decide as matters of policy or expediency,<sup>4</sup> but questions as to the amount to be assessed as benefits or awarded as damages can never be deemed questions of that character. It is not, however, simply as to questions of amount that one upon whose land a benefit assessment is sought to be laid is entitled to a judicial hearing and decision, for there are other questions upon which he is entitled to a hearing and judgment, and certainly one entitled to a hearing and judgment must, in accordance with some law, be one of the parties before the tribunal that pronounces judgment.

It is not, as we have seen, every question involved in the exercise of the right of eminent domain upon which property

<sup>1</sup> See as to sufficiency of description, *Vail v. Morris, etc., Co.*, 21 N. J. L. 189; *Quincy, etc., R. R. Co. v. Taylor*, 43 Mo. 35.

<sup>2</sup> *Watkins v. Pickering*, 92 Ind. 332.

<sup>3</sup> *Kuntz v. Sumption*, 117 Ind. 1, 3.

<sup>4</sup> *State, ex rel., v. Johnson*, 105 Ind. 463; *Trimble v. McGee*, 112 Ind. 307; *Weaver v. Templin*, 113 Ind. 298; *People v. Smith*, 21 N. Y. 595.

owners are entitled to notice, for there are many questions of expediency and policy which the legislature may determine or invest local officers or bodies with the power of determining. As a general rule the legislature may authorize local officers to decide upon the line of the proposed road or street, the mode of constructing it, the necessity for its construction and like matters, and upon all such questions the local officers may give judgment without notice to the land owner.<sup>1</sup> If the constitution provides for the submission of these questions to a tribunal of a judicial nature, then, of course, the statute must so provide, and notice is essential.<sup>2</sup>

There is much conflict in the decisions upon the question whether the land owner has a right to such a notice as will enable him to take part in selecting the jurors, commissioners or appraisers, by whom the benefits and damages are to be assessed.<sup>3</sup> There is much reason in the argument embodied in many of the decisions that the land owner is entitled to impartial triers, and of necessity is entitled to an opportunity to ascertain whether they are impartial. It seems to us that at some stage in the proceedings this right should be secured to the land owner, but that it is not essential that provision should be made for the exercise of this right, in the first instance, in cases where the decision of the tribunal is not conclusive. If there is a right of appeal to a court of general jurisdiction, then there is an opportunity for securing an impartial hearing under the general rules of law, and no substantial injustice is done, but if there is no such right, then it is a violation of sound principle to compel a party to be bound without an opportunity to discover whether the tribunal is or is not an impartial one. It

<sup>1</sup> *Weaver v. Templin*, 113 Ind. 298; *Zimmerman v. Canfield*, 42 Ohio St. 463; *Lent v. Tillson*, 72 Cal. 404; *Preble v. Portland*, 45 Me. 241; *People v. Smith*, 21 N. Y. 595; *Baltimore, etc., Co. v. Pittsburgh, etc., Co.*, 17 W. Va. 812.

<sup>2</sup> *Seifert v. Brooks*, 34 Wis. 443; *Baltimore, etc., Co. v. Pittsburgh, etc., Co.*, 17 W. Va. 812.

<sup>3</sup> *Matter of Village of Middletown*, 82 N. Y. 196; *Zack v. Penna. R. R.*, 25 Pa. St. 394; *Hunter v. Matthews*, 1 Rob. (Va.) 596; *U. S. v. Jones*, 109 U. S. 513; *Peoria v. Warner*, 61 Ill. 52; *Langford v. County*, 16 Minn. 375; *Tracy v. Elizabethtown R. R.*, 80 Ky. 259; *Central, etc., Co., Matter of*, 7 Pick. 13; *Strachan v. Brown*, 39 Mich. 168.

is not easy to perceive any just reason upon which the doctrine that a conclusive decision may be rendered, and no opportunity allowed the parties to ascertain whether the triers are disinterested and unprejudiced, can be sustained. If, however, this opportunity is given before a final hearing is had, no principle is violated, and the rule which prevails in analogous cases is given force. It is difficult to conceive how there can be due process of law where no opportunity is afforded the property owner to inquire into the fitness and qualifications of those who are to decide upon his property rights, and it seems to us that it is not within the power of the legislature to take from the citizen any essential element of the great and important right included in the constitutional provision securing to the citizen due process of law. If the legislature may designate the tribunal to decide the controversy without giving the property owner an opportunity to ascertain whether those who compose it are unprejudiced and disinterested, it may, with quite as much justice and propriety, conclusively decide the controversy without going through the form of providing a tribunal with judicial powers.

Where notice is required, it is essential to confer jurisdiction, for without some notice there is no jurisdiction, and the proceedings are absolutely void. It is not, however, to be understood that where there is jurisdiction of the subject-matter and there are many persons interested as owners of different parcels of land, failure to give notice to some of the property owners will vitiate the entire proceeding. In such cases the better opinion is that the proceeding is void only as to those who have not been notified, but valid as to those who have had notice.<sup>1</sup> A different rule would often work injustice to the public, as well as to the citizens, for it might happen that a highway would affect many persons and all of them, except one, be duly notified, and it would, under a rule different from that stated, be in his power to overturn the whole proceedings.<sup>1</sup> If the only person not notified is allowed to attack the proceedings in so far as they

<sup>1</sup> *State v. Richmond*, 6 Foster (N. H.), 108. But compare *Anderson v. Pemberton*, 89 Mo. 61. *State v. Easton R. R. Co.*, 36 N. J. L. 181; *Kidder v. Jemison*, 21 Vt.

affect him personally, that is all that justice requires, for it enables the only person injured to obtain redress. As we have seen, the general rule is that where an inferior tribunal is vested by law with a general jurisdiction of a subject, and in order to determine whether there is jurisdiction in the particular instance, the law empowers the tribunal to pass upon facts essential to confer jurisdiction, its decision will prevail as against a collateral attack, and within this rule decisions upon the question of the sufficiency of the jurisdictional facts must fall.<sup>1</sup> But this rule is valid only where there is some notice purporting to be such as the law requires, for where there is no notice at all, or one not resembling that which the law requires, or one not purporting to be given under the law, the powers of the tribunal are not called into exercise, and there is no authority for taking a single step in the proceeding. Nor can the general rule fully apply where there is no right of appeal or other remedy for the correction of material errors.<sup>2</sup>

The general rule is that notice must be given, but it is within the power of the property owner to waive it. The waiver may be either express or implied. If the owner appears he will be deemed to have waived notice, and there are different ways in which notice may be waived, but the acts relied upon as a waiver should be unequivocal in character.<sup>3</sup> In cases where the judgment is pronounced by a court of superior general jurisdiction, its decision will be sustained as against collateral attacks,

<sup>1</sup> *Knox Co. v. Aspinwall*, 21 How. 539; *Bissell v. City*, 24 How. 287; *Town v. Eaves*, 92 U. S. 484; *Commissioner v. Bolles*, 94 U. S. 104; *Potter's Dwaris*, 299; *Evansville, etc., Co. v. City*, 15 Ind. 395; *Quarl v. Abbett*, 102 Ind. 233.

<sup>2</sup> *Chambers County v. Clew*, 21 Wall. 317; *City of Madison v. Smith*, 83 Ind. 502; *Mayor v. State*, 57 Ind. 152; 1 *Dillon's Municipal Corp.* (3d ed.), section 519.

<sup>3</sup> *Seifert v. Brooks*, 34 Wis. 443; *Lums-*

*den v. Milwaukee*, 8 Wis. 485; *Hood v. Finch*, 8 Wis. 381; *Damp v. Town*, 29 Wis. 419; *Langford v. Comm'rs*, 16 Minn. 376; *Parish v. Gilmanton*, 11 N. H. 293; *Barre Turnpike Co. v. Appleton*, 2 Pick. 430; *Com. v. Westborough*, 3 Mass. 406; *Tingely v. Providence*, 9 R. I. 388; *Windsor v. Field*, 1 Conn. 279; *Polly v. Saratoga R. R.*, 9 Barb. 449; *Pitzer v. Williams*, 2 Rob. Va. 241; *Milhollin v. Thomas*, 7 Ind. 165; *Onken v. Riley*, 65 Tex. 468.



although the notice may be defective.<sup>1</sup> Some of the courts extend this doctrine to cases where the judgment is that of a court of inferior jurisdiction, although the weight of authority is, perhaps, the other way. There is an essential difference between cases where there is no notice at all and those in which there is some notice; although defective. In the one class of cases there are facts calling into exercise the power to decide upon the right to proceed in the particular case, while in the other class there is nothing invoking the exercise of that power, and consequently nothing upon which the decision can rest.<sup>2</sup>

There are, perhaps, exceptions to the general rule that failure to notify one party will not invalidate the proceedings as to others having different interests, as, for instance, a case where the consequences of the failure to give notice extend so far as to make it impossible for the street or road to be opened. Ordinarily, however, only those who are not notified have a just right to complain; if the proceedings against them are valid, those who are notified can not be injured by the failure to give notice to other persons. Proceedings in highway cases, therefore, are not, as a general rule, impeachable by persons who, by due process of law, have been brought into court, although other property owners may not have received notice.<sup>3</sup> The rule requiring notice in order to give jurisdiction applies only to the notice essential to confer jurisdiction, for where jurisdiction has once attached it is not lost by a failure to give notice of subsequent proceedings in the case.<sup>4</sup> Where parties appear they should object to the notice at the earliest practicable opportunity;

<sup>1</sup> *Isaacs v. Price*, 2 Dillon C. C. 347; *Harrington v. Wofford*, 46 Miss. 31; *Ballinger v. Tarbell*, 16 Ia. 491; *Cooper v. Sunderland*, 3 Ia. 114; *Thompson v. Tolmie*, 2 Pet. 157; *Morrow v. Weed*, 4 Ia. 77; *Headrick v. Whitemore*, 105 Mass. 23; *Finneran v. Leonard*, 7 Allen, 54; *Paine v. Moreland*, 15 Ohio, 435; *Borden v. State*, 6 Eng. 519; *Sheldon v. Wright*, 5 N. Y. 497; *Delany v. Gault*, 30 Pa. St. 65; *People v. Hagar*, 52 Cal. 171; *Cullen v. Ellison*, 13 Ohio St. 446; *Muncy v. Joest*, 74 Ind. 409;

*McAlpine v. Sweetser*, 76 Ind. 78; *Quarl v. Abbett*, 102 Ind. 233.

<sup>2</sup> *City of Terre Haute v. Beach*, 96 Ind. 143; *Town of Cicero v. Williamson*, 91 Ind. 541.

<sup>3</sup> *State v. Richmond*, 6 Foster, 235; *Nichols v. Salem*, 14 Gray, 490; *State v. Easton R. R.*, 36 N. J. L. 181; *Kidder v. Jennison*, 21 Vt. 108.

<sup>4</sup> *Commissioners v. Espen*, 12 Kan. 531; *Supervisors v. Magoon*, 109 Ill. 142.

if they fail to do so they can not subsequently make the objections available.<sup>1</sup> If the notice of the meeting is irregular and an adjournment is had, an appearance without objection at the adjourned meeting will operate as a waiver of all objections to the notice.<sup>2</sup>

Where the statute requires that notice shall be given in a particular manner, notice given in a manner materially different from that provided will not, when appropriately challenged, be sufficient, as, for instance, if the statute provided for notice by publication, mere personal notice would not be sufficient.<sup>3</sup> There may be cases where personal notice would conclude the person notified from contesting the proceedings, but this could only be so in a case where there were facts estopping the person receiving such notice from assailing the validity of the proceedings. In such a case the doctrine of estoppel would control, and unless the elements of an estoppel existed, the party would not be concluded. Notice must be given substantially in the manner prescribed by the statute, and to the persons designated.<sup>4</sup> Where the statute provides for personal service upon resident parties no other notice will be sufficient, but where the statute provides for constructive notice that will be sufficient as to all persons, whether residents or non-residents.<sup>5</sup> Where the statute requires notice to owners of property, it is sufficient, as a general rule, to give notice to those whose titles appear of record.<sup>6</sup> This must ordinarily be the rule in highway cases as well as in other cases, since there is no other method provided by law for ascertaining who are the owners

<sup>1</sup>Peavey v. Wolfborough, 37 N. H. 286; Stephens v. Leavenworth Co., 36 Kan. 664; Washington Ice Co. v. Lay, 103 Ind. 48; Orton v. Tilden, 110 Ind. 131.

<sup>2</sup>Anderson v. Wood, 80 Ill. 16; Supervisors v. Magoon, 109 Ill. 142.

<sup>3</sup>Jackson v. Dyar, 104 Ind. 516; Adams v. Clarksburg, 23 W. Va. 203.

<sup>4</sup>Curran v. Shattuck, 24 Cal. 427; Morgan v. Chicago R. R., 36 Mich. 428; Troy v. Doniphan Co., 32 Kan. 507; Memphis, etc., R. R. Co. v. Par-

sons R. R. Co., 26 Kan. 503; Chicago, etc., R. R. Co. v. Smith, 78 Ill. 96.

<sup>5</sup>Owners v. Mayor, etc., 15 Wend. 374. See, also, *In re* Road in Sterrett Twp., 114 Pa. St. 627; State v. Chicago, etc., R. R. Co., 68 Ia. 135; Weir v. St. Paul, etc., R. R. Co., 18 Minn. 155; Stuart v. Palmer, 74 N. Y. 183.

<sup>6</sup>Wilson v. Hathway, 42 Iowa, 173; Pickford v. Lynn, 98 Mass. 491. See, also, Lawrence v. Nahant, 136 Mass. 477; State v. C. B. & Q. R. R. Co., 68 Iowa, 135.

of land, and if the owner by his own carelessness omits to give the legal notice of his title he is so much in fault as not to be entitled to be heard to aver that he was not given notice of the proceedings taken to appropriate the land. All who are the owners of interests in the land should have notice, unless the statute makes a different provision, and it is not enough to notify some of the owners.<sup>1</sup>

The form of the notice is not important unless the statute expressly prescribes a particular form, but the substance of the notice must, in all essential features, be such as the statute requires.<sup>2</sup> The notice should be such as to give the parties reasonable information of the general character of the road or street proposed to be opened, and of the time and place when the petition will be acted on. Where the law requires that notice shall be served in a designated manner, and that proof of service shall be made in the method prescribed, its requirements must be obeyed or the notice will be insufficient.<sup>3</sup> It is not in the power of the court to substitute a different method of service or of proof of service for that prescribed by the statute.<sup>4</sup> It is competent for the legislature to prescribe how the notice shall be served, and what shall be sufficient evidence of service. In the exercise of this general power the legislature may make the affidavit of a party, the affidavit of a third person, or the return of an officer, competent evidence that notice has been served.<sup>5</sup> Where the statute makes no provision as to the method in which notice shall be served, then it is proper for the tri-

<sup>1</sup> *Norton v. Walkill R. R.*, 63 Barb. 77; *New Orleans, etc., Co. v. Frederic*, 46 Miss. 1; *Whitcher v. Benton*, 48 N. H. 157. See, also, *Gerrard v. Omaha, etc., R. R. Co.*, 14 Neb. 270. *Babb v. Carver*, 7 Wis. 124; *Adams v. Clarksburg*, 23 W. Va. 203; *Vizzard v. Taylor*, 97 Ind. 90; *Jackson v. Dyar*, 104 Ind. 516.

<sup>2</sup> *Nichols v. Bridgeport*, 23 Conn. 189; *Baltimore v. Bolldin*, 23 Md. 328; *Harbeck v. Toledo*, 11 Ohio St. 219; *Hewes v. Reis*, 40 Cal. 255; *Sharp v. Johnson*, 4 Hill, 92, S. C. 40 Am. Dec. 259; *State v. Castle*, 44 Wis. 670; *Austin v. Allen*, 6 Wis. 134; *Quincy R. R. v. Taylor*, 43 Mo. 35; *Commissioners v. Hoblit*, 19 Ill. App. 259.

<sup>3</sup> *State v. Elizabeth*, 32 N. J. L. 357; *Lancaster v. Pope*, 1 Mass. 86; *Wickle v. Camden R. R.*, 14 N. J. L. 162; *Skinner v. Lake View Avenue*, 57 Ill. 151; *Jones v. Barclay*, 2 J. J. Marsh. 73; *Purdy v. Martin*, 31 Mich. 455; *People v. Com.*, 14 Mich. 528; *Dupont v. High. Com.*, 28 Mich. 362.

<sup>4</sup> *State v. Otoe Co.*, 6 Neb. 129; *Doody v. Vaughan*, 7 Neb. 28; *People v. Com.*, 14 Mich. 528; *Van Auker v. Com.*, 27 Mich. 414.

bunal having jurisdiction of the subject to act upon satisfactory evidence of service, and any of the usual and appropriate modes of service will be sufficient.<sup>1</sup> A party who questions the sufficiency of the service, or the evidence of service, must make his objections at the earliest practicable opportunity, for, if he appears and contests the validity of the proceedings upon other grounds, he will be deemed to have waived all objections to the service and to the evidence upon that question.<sup>2</sup> An unimportant deviation from the statutory provisions in the form of the notice or the manner of service will not vitiate the proceedings.<sup>3</sup> In strictness the record should show a judgment upon the sufficiency of the notice, but an assumption of jurisdiction is deemed to imply such a judgment. If the record does show, either by an express statement, or by clear implication, that there is a judgment adjudicating the sufficiency of the notice, it is not necessary to set out the notice and service in the record unless the statute requires that it should be done.<sup>4</sup>

Where a time is fixed by the notice for a hearing, then the case must be taken up at the time designated or a new notice issued. It is, of course, not necessary to complete the investigation at the time specified, but some steps must then be taken. Some of the cases go so far as to hold that if the petition or application is not acted upon at the time designated the proceedings must be commenced *de novo*, but this is carrying the doctrine too far, for no good can be accomplished by such a rule, and no harm is done by the rule that upon giving a new notice the proceedings may be resumed. Where, however, nothing is done at the appointed time, justice demands that a new notice should be served, since to hold otherwise would result in keeping a party constantly watching the proceedings for an indefinite length of time.<sup>5</sup> This rule can not, of course, apply where

<sup>1</sup> Parish v. Gilmanton, 11 N. H. 293.

<sup>2</sup> Indiana, etc., Co. v. Allen, 100 Ind. 409.

<sup>3</sup> State v. Shreeve, 15 N. J. L. 57, Hoagland v. Culvert, 20 N. J. L. 387; Snyder v. Trumbour, 38 N. Y. 355, Lawrence v. Nahant, 136 Mass. 477.

<sup>4</sup> Shinkle v. Magill, 58 Ill. 422; Kissinger v. Hanselman, 33 Ind. 80; Hume v. Conduit, 76 Ind. 598; Taylor v. Mc-

Clure, 28 Ind. 39; Pressler v. Turner, 57 Ind. 56; Wright v. Wells, 29 Ind. 354; Com'rs v. Bowie, 34 Ala. 461; Platter v. Board, 103 Ind. 360.

<sup>5</sup> Hobbs v. Board, 103 Ind. 575; Anderson v. St. Louis, 47 Mo. 479; State v. Scott, 9 N. J. L. 17; Roberts v. Williams, 13 Ark. 355; Adams v. Clarksburg, 23 W. Va. 203.

there has been a final judgment disposing of the entire case, for such a judgment must be regarded as ending the particular controversy, otherwise there would be no end to the litigation. If the petition is taken up at the appointed time, then adjournments and postponements may be ordered, unless there is some prohibitory provision in the statute.<sup>1</sup> An irregular adjournment, or a failure to make the proper adjourning order, can not be regarded as a jurisdictional defect.<sup>2</sup>

Where an effective notice has been given it extends to all subsequent proceedings, except in cases where a different provision is expressly or impliedly made by statute, or where some unusual or special step is taken, for parties once in court are bound to take notice of all ordinary intermediate proceedings.<sup>3</sup> If, for any cause, there is a failure to take some steps in the matter at the time appointed, or if there is an adjournment to a time not definitely fixed, a new notice must be given or the entire proceeding will fail.<sup>4</sup> If the proceeding is completely ended, then there must be an entire new proceeding, for jurisdiction once lost can not be resumed, and it is lost when the notice has entirely spent its force. There are, doubtless, instances where, from the nature of the action taken or the character of the object designed to be accomplished, notice of intermediate steps should be given.<sup>5</sup> Where the notice required in order to confer jurisdiction has been given, the failure to give notice of some intermediate step may be such an irregularity or error as will defeat the proceedings on a direct attack, but it will not render them void for want of jurisdiction.

<sup>1</sup> *Allison v. Com'rs*, 54 Ill. 170.

<sup>2</sup> *Goodwin v. Wethersfield*, 43 Conn. 437.

<sup>3</sup> *Masters v. McHolland*, 12 Kan. 17; *Com. v. County*, 8 Pick. 343; *Burnham v. Thompson*, 35 Ia. 421; *St. Louis v. Gleason*, 15 Mo. App. 25; *Thorndike v. Com.*, 117 Mass. 566.

<sup>4</sup> *Memphis, etc., Co. v. Parsons, etc.*, Co., 26 Kan. 503; *State v. Plainfield*, 41 N. J. L. 138; *Anderson v. St. Louis*, 47 Mo. 479.

<sup>5</sup> *Com. v. Cambridge*, 7 Mass. 158; *Shaffner v. St. Louis*, 31 Mo. 264.

## CHAPTER XIV.

### THE APPLICATION OR PETITION.

A petition is not always required in proceedings to lay out roads and streets, for the local or municipal authorities may, in many jurisdictions, order a road or street laid out and opened without any formal application or petition; but in every instance, whether ordered by the public authorities or not, the property owner is entitled to his day in court. Something in the form of a petition, whether it be an application, a formal petition, an instrument of appropriation, an ordinance, resolution, or order, is always essential as a foundation for the proceedings.<sup>1</sup> It is held by some of the courts that an oral application is sufficient unless the statute requires a written one,<sup>2</sup> but we can not yield our assent to this view, for we think that where the statute is silent the ordinary rules of procedure should be resorted to, and under them a written pleading of some sort is necessary. The silence of the statute by no means excludes the general rules of law; on the contrary, the general rules should be considered as in force unless annulled or excluded by the words of the statute or by fair implication.<sup>3</sup> The appropriate mode of instituting the proceedings is by a written petition, unless a different provision is made by statute.<sup>4</sup> In all cases the statute

<sup>1</sup> Where the statute requires a petition it is indispensable, for without it there is no jurisdiction. *State v. Morse*, 50 N. H. 9; *State v. Otoe*, 6 Neb. 129; *People v. Judge*, etc., 40 Mich. 64; *State v. Berry*, 12 Ia. 58; *Oliphant v. Com'rs*, 18 Kan. 386.

<sup>2</sup> *Whitworth v. Puckett*, 2 Gratt. 527; *Hawkins v. The Justices*, 12 Lea. (Tenn.) 351.

<sup>3</sup> *Curtis v. Pocahontas County*, 72 Ia. 151. An organized public corporation as a county or a city may, it is hardly

necessary to suggest, commence proceedings by an order or ordinance, but there should be enough in whatever constitutes the foundation of the proceedings to inform the public and the parties interested of the line, nature, and dimensions of the proposed public way.

<sup>4</sup> *Vail v. Morris*, etc., Co., 21 N. J. L. 189; *Com. v. Coombs*, 2 Mass. 489; *Kroop v. Forman*, 31 Mich. 144; *Pritchard v. Atchison*, 3 N. H. 335.

governs, and where a particular mode of procedure is provided that mode must, of course, be substantially pursued. If the statute requires a petition and none is filed no jurisdiction is acquired.<sup>1</sup> Ordinarily the statute suggests the requisites of the petition, and to avail against a direct attack the petition should in every instance substantially conform to the requirements of the statute.<sup>2</sup>

While it is true that a petition for the location and opening of a road or street must substantially conform to the requirements of the statute, no great degree of technical accuracy and precision is required.<sup>3</sup> If the facts essential to the existence of jurisdiction of the subject-matter appear in the petition, then the judgment pronounced in the proceedings will not be adjudged void because of the insufficiency of the petition, although it may be erroneous. Many defects in a petition that would be available on a direct attack would be entirely destitute of force in a collateral proceeding. No matter how defective the petition, the judgment will not be void if there is jurisdiction of the subject-matter and of the parties, unless, indeed, the judgment is entirely beyond the power of the jurisdiction of the court. In a collateral attack no defect in the petition will be available, unless it goes to the jurisdiction.<sup>4</sup> Where, however, there is a direct attack upon the petition, then if there are substantial de-

<sup>1</sup> *State v. Morse*, 50 N. H. 9. *State v. Oteo*, 6 Neb. 129. *People v. Judge*, etc., 40 Mich. 65; *State v. Berry*, 12 Ia. 58.

<sup>2</sup> Unless required by the statute the petition need not aver that the petitioners are freeholders. *Humboldt County v. Dinsmore*, 75 Cal. 604.

<sup>3</sup> *Windham v. Commissioners*, 26 Me. 406; *Jackson v. Rankin*, 67 Wis. 285. *Dickinson County v. Hogan*, 39 Kan. 606, S. C. 18 Pac. R. 611. An ordinance which employs words of substantially the same meaning as those used in the statute is sufficient. *Dorman v. Lewistown*, 81 Me. 411, S. C. 17 Atl. 316. An insufficient petition, unless the defect is jurisdictional, will be a mere irregularity, and not available in a purely collateral

attack. *Pearsali v. Eaton Co.* (Mich.), 15 West R. 522. If the petition contains all that the statute requires, it is not invalidated by the fact that it contains more. *Toledo, etc., Co. v. East Saginaw, etc., Co.* (Mich.), 40 N. W. R. 436.

<sup>4</sup> *Morrow v. Weed*, 4 Ia. 77. *Smith v. Engle*, 44 Ia. 265; *Town v. Williamson*, 91 Ind. 541; *City of Terre Haute v. Beach*, 96 Ind. 143. *United States v. Arredondo*, 6 Peters, 691. A defect will often defeat the proceedings in a direct attack and yet be unavailing in a collateral one. *Lake Shore, etc., Co. v. Cincinnati, etc., Co.*, 116 Ind. 578, 599. See, however, *Colorado Central R. R. v. Allen* (Col.), 22 Pac. 605.

fects in it the proceedings will be dismissed, unless the case is one in which the defect can be remedied by an amendment. Where the statute requires that the owners of lands shall be named in the petition, this must be done. This is a jurisdictional matter, so far as concerns parties not named,<sup>1</sup> since it is the method by which the parties proceeded against are brought into court.<sup>2</sup>

It is necessary that those who petition for the road should show themselves to be within the statute, for where a right is founded on a statute, the plaintiff must bring his case within it. There is some conflict on this question, but, upon principle, it should be held that where the statute requires that the petitioners shall be freeholders, that fact must appear in the petition, or

<sup>1</sup>It is doubtful whether it would affect others who are named, unless it should appear that no way could be laid out.

<sup>2</sup>*Hays v. Campbell*, 17 Ind. 430; *Conway v. Ascherman*, 94 Ind. 187; *Godchaux v. Carpenter*, 19 Nev. 415, S. C. 14 Pac. R. 140. See, however, *Dakota County v. Cheney*, 22 Neb. 437, S. C. 35 N. W. R. 211. The authorities generally agree that there must be an averment of necessity for the taking in order to confer jurisdiction, or that such facts must be stated as authorize the inference that there is such a necessity as invokes the exercise of the power of eminent domain, and that the averment is a jurisdictional one, but there is much difference of opinion as to the mode of pleading the fact. *Brown v. Rome, etc., Co.*, 86 Ala. 206, S. C. 5 So. R. 195; *Portland, etc., Co. v. Bobb (Ky.)*, 10 S. W. R. 794; *Harvey v. Helena*, 6 Mon. 114; *Barr v. Flynn*, 20 Mo. App. 383; *Colville v. Judy*, 73 Mo. 651; *Lockwood v. Gregory*, 4 Day, 407; *Deisner v. Simpson*, 72 Ind. 435; *Windsor v. Field*, 1 Conn. 279; *Leath v. Summers*, 3 Iredell L. 108; *Grand Rapids, etc., Co. v. Van*

*Driele*, 24 Mich. 409; *Truax v. Sterling (Mich.)*, 41 N. W. R. 885; *In re Road in Sterrett Township*, 114 Pa. St. 627. It is generally held that the requirement that the petition be signed by the designated number of persons is jurisdictional. *Zimmerman v. Snowdon*, 88 Mo. 218; *Blize v. Castello*, 8 Mo. App. 290; *Shaffer v. Weech*, 34 Kan. 595; *Minard v. Douglass County*, 9 Ore. 206; *King v. Benton Co.*, 10 Ore. 512; *Kahn v. San Francisco (Cal.)*, 21 Pac. R. 849; *Richmond v. Board*, 70 Ia. 627; *Damp v. Dane*, 29 Wis. 419; *Bradford v. Cole*, 8 Fla. 263. But if the petition is sufficient on its face and is apparently signed by the requisite number of qualified persons, it will be good against a collateral attack. *Ely v. Board*, 112 Ind. 361; *Keyes v. Tait*, 19 Ia. 123; *Daugherty v. Brown*, 91 Mo. 26; *Snoddy v. County of Pettes*, 45 Mo. 361. *Prima facie* the recitals of the petition are true, and, if true, jurisdiction exists. *State v. Nelson*, 57 Wis. 147. Where jurisdiction has attached the withdrawal of a petitioner will not oust it. *Little v. Thompson*, 24 Ind. 146; *Grinnell v. Adams*, 34 Ohio St. 44.



it will be bad on motion or demurrer.<sup>1</sup> Some of the decisions upon this question go so far as to declare that if the petition does not show that the petitioners are freeholders, jurisdiction does not exist, and the proceedings are void,<sup>2</sup> without the qualification that the defect is only fatal in a direct attack and upon a seasonable objection.<sup>3</sup> This we regard as an erroneous doctrine. It is the statute that invests the tribunal with general jurisdiction of the subject, and to call into exercise this jurisdiction in the particular instance, no more is needed than that there should be a petition substantially such as the law requires. A petition stating jurisdictional facts, although it does so defectively, will sustain the proceedings as against a collateral attack. The omission to describe the petitioners as freeholders may render the petition subject to attack by motion or demurrer, but it is not such a defect as renders the proceedings absolutely void. If the contrary doctrine be affirmed, then the line between direct and collateral attacks is destroyed, and mere defects or omissions become reviewable in a collateral proceeding. It is, perhaps, essential to jurisdiction to show that the petition was signed by the requisite number of persons,<sup>4</sup> but the mere failure to describe them as freeholders ought not to be considered a defect reaching the jurisdiction.<sup>5</sup> If the petition is signed by a sufficient number of qualified persons then the fact that one who signs is not qualified will not vitiate it, but it would be otherwise if it required his name to make the requisite number.<sup>6</sup>

Where a petition is required it constitutes the foundation of

<sup>1</sup> *Board v. Muhlenbacker*, 18 Kan. 129; *Oliphant v. Com.*, 18 Kan. 386; *Early v. Hamilton*, 75 Ind. 376; *Conway v. Ascherman*, 94 Ind. 387. See, also, *Zimmerman v. Snowden*, 88 Mo. 218; *Shaffer v. Weech*, 34 Kan. 595.

<sup>2</sup> *Jefferson County v. Cowan*, 54 Mo. 234; *Doody v. Vaughan*, 7 Neb. 28.

<sup>3</sup> *Washington Ice Co. v. Lay*, 103 Ind. 48; *Brown v. McCord*, 20 Ind. 270; *Robinson v. Rippey*, 111 Ind. 112; *Keyes v. Tait*, 19 Ia. 123; *Snoddy v. County*, 45 Mo. 361; *Willis v. Sproule*,

13 Kan. 257; *Austin v. Allen*, 6 Wis. 134.

<sup>4</sup> *Williams v. Holmes*, 2 Wis. 96; *Damp v. Town*, 29 Wis. 428. See, also, *Zimmerman v. Snowden*, 88 Mo. 218.

<sup>5</sup> *Forsythe et al. v. Kreuter et al.*, 100 Ind. 27; *Elliott v. Green*, 86 Ind. 53; *State v. Prine*, 25 Iowa, 231.

<sup>6</sup> *Hyde Park v. County*, 117 Mass. 416. It is held that a married woman who is the owner of land may sign a petition. *Galloway v. Shiply* (Md.), 17 Atl. 1023.

the proceedings.<sup>1</sup> It must, therefore, contain such facts as will enable the court to lay out the road as prayed, and inform the parties interested of the rights and lands affected.<sup>2</sup>

The cases which hold that there must be an exact and literal compliance with all the provisions of the statute proceed upon the erroneous theory that the proceeding is an *ex parte* one. This theory is, as we believe, erroneous, for the proceeding is an adversary one, and the parties have their day in court upon due notice. All that can justly be required is, therefore, that there shall be a substantial compliance with the statute, and this is all that is required by the majority of well considered cases, for they hold that the omission of matters of an immaterial character, or the lack of certainty, will not render the petition fatally defective. If there is a defect of a material character, then, of course, the petition must be deemed insufficient, but this result will not follow where the defect is not of a substantial nature.<sup>3</sup> The material facts must in all cases be pleaded directly, and not by way of recital, or a seasonable objection to the petition, made in a direct attack, will prevail.<sup>4</sup> Reasonable and fair intendments will be made in favor of the petition, but material allegations will not be supplied.<sup>5</sup> Where the statute expressly requires that the petition shall contain specified allegations, they must be found in it, although it is not always necessary that the exact language of the statute should be employed.<sup>6</sup> It is essential to an intelligent investigation of the matter that the petition, or application, which constitutes the foundation of the entire proceedings should state all the material facts, and so state them that issue may be taken and a just decision upon the rights of the parties be rendered, and so expressed as to enable the ministerial officers to carry it into execution.

<sup>1</sup> *Com. v. Peters*, 3 Mass. 229.

<sup>2</sup> *Curtis v. Pocahontas Co.*, 72 Ia. 151.

<sup>3</sup> *Monterey v. Berkshire*, 7 Cush. 395;

*Wolsey v. Board*, 32 Iowa, 231; *State v. Prince*, 25 Iowa, 231; *State v. Lane*, 26 Iowa 223; *Heick v. Voight*, 110 Ind. 279; *Townsend v. Chicago, etc., Co.*, 91 Ill. 545.

<sup>4</sup> *Lake Shore, etc., Co. v. Cincinnati, etc., Co.*, 116 Ind., 578; *Hays v. Campbell*, 17 Ind. 430.

<sup>5</sup> *In re Grove St.*, 61 Cal. 438.

<sup>6</sup> *Matter of Com. of Wash. Park*, 52 N. Y. 131.

The petition should affirmatively show that the line of the proposed road or street is within the territorial jurisdiction of the court or tribunal in which the proceedings are had. It is not necessary, however, that the city, county or township should be expressly named; it is sufficient if the description given is such as to enable the court to take judicial knowledge of the political subdivision in which it is proposed to locate the way. Where government surveys are appropriately referred to, or towns, cities or townships named, the court will take notice of the jurisdiction within which they are situated.<sup>1</sup> But it is, of course, safer to specifically state the location, since confusion and error may be thus avoided.<sup>2</sup>

An important part of the petition or application is that which describes the proposed road or street, but, even in the description of the line and character of the proposed highway, the highest degree of certainty is not required.<sup>3</sup> The termini of the way should in all cases be stated, and the failure to do this with reasonable certainty will make the petition fatally defective. The description of the line and character of the road should, at least, be so accurate and certain as to convey reasonable information to all parties, and such as to enable a surveyor to locate it.<sup>4</sup> If places are designated which will enable persons familiar with the locality to locate the way with reason-

<sup>1</sup> *Sutherland v. Holmes*, 78 Mo. 399; *Clift v. Brown*, 95 Ind. 53. See, also, *Lower v. Chicago, etc.*, R. R. Co., 59 Iowa, 563.

<sup>2</sup> The road or premises should be so described that there can be no question as to their identity. *In re N. Y. Central, etc.*, R. R. Co., 70 N. Y. 191; *Toledo, etc.*, R. R. v. *Munson*, 57 Mich. 42, S. C. 20 Am. & Eng. R. R. Cases, 410; *West v. West, etc.*, R. R. Co., 61 Miss. 536.

<sup>3</sup> *State v. Northrop*, 18 N. J. L. 271; *State v. Vanbuskirk*, 24 Ia. 86; *Mossman v. Forrest*, 27 Ind. 233; *Clifford v. Eagle*, 35 Ill. 444; *Sumner v. Comm'rs*, 37 Me. 112; *Lewiston v. Comm'rs*, 30

Me. 19; *Windsor v. Field*, 1 Conn. 279; *Henline v. People*, 81 Ill. 269; *State, ex rel. Supervisors, v. Nelson*, 57 Wis. 147.

<sup>4</sup> *Hyde Park v. Norfolk*, 117 Mass. 416; *Com. v. Coombs*, 2 Mass. 489; *Windham v. Com.*, 26 Me. 406; *Hayford v. Com.*, 78 Me. 153; *Windsor v. Field*, 1 Conn. 279; *In re Road Sterrett Tp.*, 114 Pa. St. 627; *Clift v. Brown*, 95 Ind. 53; *Smith v. Weldon*, 73 Ind. 454; *Jackson v. Rankin*, 67 Wis. 285; *Johns v. Marion Co.*, 4 Ore. 46; *State v. Green*, 18 N. J. 179; *State v. Woodruff*, 36 N. J. L. 204; *Clement v. Burns*, 43 N. H. 609; *State v. Rapp (Minn.)*, 38 N. W. 926.

able certainty, the description will be deemed sufficient.<sup>1</sup> It is obvious that the description should be reasonably definite and certain since the interested parties are entitled to notice and to information that will, at least, enable them to locate the line of the proposed way,<sup>2</sup> and the order laying out the road must conform with substantial accuracy to the description contained in the petition. Where the statute provides that all roads shall be of a designated width then there is no necessity for stating the width of the proposed way in the petition, but where no width is fixed by law, the petition should state what the width of the way will be.<sup>3</sup> It has been held that where the petition describes the line of the proposed way so fully as to impart information to those interested and to those living in the neighborhood and familiar with the locality, it will be sufficient.<sup>4</sup>

A petition or application for a road or street need not be verified unless the statute requires it.<sup>5</sup> If no objection is made an unverified petition will be valid.<sup>6</sup> A verification by an agent or attorney will be sufficient unless the statute designates the persons who shall make the affidavit.<sup>7</sup> No particular form of verification is required except in cases where the statute prescribes a particular form.<sup>7</sup>

Where the law requires that a petition or application shall be filed within a designated time, a failure to file it within the time prescribed will, upon a proper and seasonable objection, avoid the proceedings.<sup>8</sup> If the land owner appears, and the case is tried upon its merits without the interposition of an objection, the proceeding will be valid although the petition is not filed within the time limited. If it appears that the parties have treated the petition as duly filed and a judgment is entered the

<sup>1</sup>Casey v. Kilgore, 14 Kan. 478; Sutherland v. Holmes, 78 Mo. 399; Collins v. Rupe, 109 Ind. 340; Adams v. Harrington, 114 Ind. 66.

<sup>2</sup>Packard v. Androscoggin (Me.), 12 Atl. R. 788.

<sup>3</sup>State v. Hogue (Wis.), 36 N. W. 860; Watson v. Crowsore, 93 Ind. 220.

<sup>4</sup>State v. Rapp (Minn.), 38 N. W. R. 926.

<sup>5</sup>Gammel v. Potter, 2 Ia. 562. Com-

pare Reitenbaugh v. Chester Valley R. Co., 21 Pa. St. 100

<sup>6</sup>Matter of the Boston R. R., 79 N. Y. 64.

<sup>7</sup>Updegraff v. Palmer, 107 Ind. 181; City of Detroit v. Beecher (Mich.), 42 N. W. R. 986; Harvey v. Lloyd, 3 Pa. St. 331; Skinner v. Lake View Avenue, 57 Ill. 151; Tucker v. Erie, etc., Co., 27 Pa. St. 281. Matter of New York, etc., R. R., 33 Hun. 148.

<sup>8</sup>Road Case, 6 Phila. 143.

proceedings will be valid although the record does not formally show the filing of a petition.<sup>1</sup> Objections to the form of a petition should be specific, for a general objection will not present questions as to merely formal or non-essential matters.<sup>2</sup> In general all objections not going to the jurisdiction will be deemed waived unless promptly made.<sup>3</sup>

The courts have established a liberal rule respecting amendments and defects in the petition and the proceeding may often be cured by amendment. In a great many cases courts have permitted material amendments to be made, and many of them have treated the matter as one of discretion, refusing to interfere unless there has been an abuse of discretion by the court of original or intermediate jurisdiction.<sup>4</sup>

<sup>1</sup> *Updegraff v. Palmer*, 107 Ind. 181.

<sup>2</sup> *Worcester v. Keith*, 5 Allen, 17; *Howard v. Hutchinson*, 10 Me. 335; *Anderson v. Baker*, 98 Ind. 587; *Higbee v. Peed*, 98 Ind. 420; *Meranda v. Spurlin*, 100 Ind. 380; *Carr v. State*, 103 Ind. 548; *Updegraff v. Palmer*, 107 Ind. 181.

<sup>3</sup> *Wells v. Rhodes*, 114 Ind. 467; *Palmer v. Highway Com.*, 49 Mich. 45; *Bachelor v. New Hampton*, 60 N. H. 207.

<sup>4</sup> *Colorado, etc., Co. v. Allen* (Col.), 22 Pac. R. 605; *Young v. Laconia*, 59 N. H. 534; *Burns v. Simmons*, 101 Ind. 557; *Coolman v. Fleming*, 82 Ind. 117; *Pa. R. R. Co. v. Lutheran Congregation*, 53 Pa. St. 445, *Pa. R. R. v. Porter*, 29 Pa. St. 165; *Windham v. Litchfield*, 22 Conn. 226; *Howe v. Jamaica*, 19 Vt. 607; *Patten's Petition*, 16 N. H. 277; *Webster v. Bridgewater*, 63 N. H. 296. *Russell v. Turner*, 62 Me. 496; *Perry v. Sherborn*, 11 Cush. 388.

## CHAPTER XV.

### CONCERNING PROCEDURE IN APPROPRIATION CASES.

It is a safe general rule to make objections to the applications for the appointment of commissioners, viewers, or appraisers at the earliest legal opportunity, for the failure to make a seasonable objection will often operate as a waiver. Where the application is to a court of general jurisdiction by petition or complaint a demurrer is often an appropriate method of presenting the objection,<sup>1</sup> but in other cases the objection may be presented by exceptions,<sup>2</sup> by a motion to dismiss the proceedings,<sup>3</sup> or by an objection to the appointment of commissioners or appraisers.<sup>4</sup> Where the objection is made in a court of inferior jurisdiction, the ordinary practice is to file a motion to dismiss the proceedings and to specifically set forth in the motion the objections to the application or petition. If the objection to the proceeding does not appear upon the face of the complaint, petition, or application, the grounds of objection should be set forth with particularity in a plea or answer.<sup>5</sup>

<sup>1</sup> *Lake Pleasanton, etc., Co. v. Contra Costa, etc.*, 67 Cal. 659.

<sup>2</sup> *New Orleans, etc., Co. v. Southern, etc., Co.*, 53 Ala. 211.

<sup>3</sup> *South Chicago, etc., Co. v. Dix*, 109 Ill. 237; *Chicago and Northwestern R. R. Co. v. Chicago and Evanston, R. R. Co.*, 112 Ill. 589; *County Court v. Griswold*, 58 Mo. 175.

<sup>4</sup> *Matter of Marsh*, 71 N. Y. 315; *Olmstead v. Proprietors of the Morris Aqueduct*, 46 N. J. L. 495. In *Manistee, etc., R. R. Co. v. Fowler* (Mich.), 41 N. W. R. 261, it is held that the question whether there is any sufficient cause for resorting to condemnation proceedings is preliminary in its character, and where it is raised by a plea in abatement should be settled before allowing an inquest.

<sup>5</sup> *Tracy v. Elizabethtown, etc., R. R. Co.*, 80 Ky. 259; *In re St. Paul Ry. Co.*, 34 Minn. 227; *Matter of Lackawanna, etc., R. R. Co.*, 99 N. Y. 12, S. C. 35 Hun. 220; *South Carolina R. R. Co. v. Blake*, 9 Rich. 228; *Terry v. Waterbury*, 35 Conn. 526; *Hadley v. Citizens Savings Institution*, 123 Mass. 301; *Crawford v. Rutland*, 52 Vt. 412; *Baltimore and Ohio R. R. Co. v. Pittsburgh, etc., Co.*, 17 W. Va. 812. In some of the States it is held that a formal plea or answer is unnecessary. *Matter of New York Central R. R. Co.*, 66 N. Y. 407. See *Chicago and Iowa R. R. Co. v. Hopkins*, 90 Ill. 316; *Bentonville, etc., Co. v. Stroud*, 45 Ark. 278; *Corbin v. Wisconsin, etc., Co.*, 66 Iowa, 269; *Union, etc., Co. v. Leavenworth, etc., Co.*, 29 Fed. Rep. 728.

The question of the capacity of a county, township, city or town to seize property for streets or roads can seldom arise, and it is only in rare instances, if, indeed, in any, that there can be any question as to their corporate existence, but whenever such a question does arise it should be presented in due season or it will be waived. The rule in analogous cases is that it is sufficient to show a corporation *de facto*,<sup>1</sup> and there is abundant reason for applying that rule where governmental instrumentalities seek to appropriate lands for roads and streets.

Where the statute declares how much land shall be appropriated no more can rightfully be taken, and some of the courts hold that if there is an attempt to appropriate more the petition should be denied and the proceedings dismissed.<sup>2</sup> Where the legislature does not designate the quantity of property that may be appropriated, the proper tribunal must ascertain the quantity,<sup>3</sup> and so specifically describe it as that it can be surveyed and located.

Where there is no denial of the necessity for the seizure of the land, it is held that the property owner admits that the necessity exists,<sup>4</sup> but we suppose this can be true only in cases where it is made to appear directly or indirectly that there is a *prima facie* case authorizing the seizure. Where issue is made upon the question of necessity then the burden is on the party seeking to appropriate the property. This rule, however, can not obtain where the municipal officers, or other highway officers, are invested with the power of determining when there is a necessity for opening or widening highways,<sup>5</sup> nor, as appears

<sup>1</sup> Cincinnati, etc., Co. v. Danville, etc., Co., 75 Ill. 113; Peoria, etc., R. R. Co. v. Peoria, etc., Co., 105 Ill. 110; Reisner v. Strong, 24 Kan. 410; National Docks Co. v. Central R. R. Co., 32 N. J. Eq. 755; People v. County Court, 28 Hun. 14. See Clarke v. Chicago, etc., R. R. Co., 23 Neb. 613, 37 N. W. R. 484.

<sup>2</sup> Central R. R. Co. v. Hudson Terminal Co., 46 N. J. L. 289.

<sup>3</sup> People v. Blake, 19 Cal. 579; Spring Valley Water Co. v. San Mateo, etc.,

Co., 64 Cal. 123; Reed v. Louisville Bridge Co., 8 Bush. 69; New Orleans Ry. v. Gay, 32 La. Ann. 471; Carolina Central R. R. Co. v. Love, 81 N. C. 434; McWhirter v. Cockrell, 2 Head. 9; Wisconsin Central R. R. Co. v. Cornell University, 52 Wis. 537. See Smith v. Chicago and Western R. R. Co., 105 Ill. 511.

<sup>4</sup> South Carolina R. R. Co. v. Blake, 9 Rich. 228.

<sup>5</sup> Kansas City v. Baird (Mo.), 11 S. W. R. 243.

from what we have already said, can it obtain where the legislature itself passes upon and decides the question of necessity. The question of necessity is not always submitted to the courts in a direct form, but it is ordinarily submitted by providing that the tribunal designated shall ascertain and determine whether the road or street will be "of public utility," whether it will "promote the public welfare," or whether "it will be for the good of the inhabitants of the town," but whatever may be the form in which the question is submitted, the property owner may, in all cases where it is submitted to judicial investigation, put in a denial and compel proof of the necessity for the highway in the form prescribed by the statute.

In our previous discussion of some of the questions respecting procedure in appropriation cases we directed attention to the diversity of opinion which prevails, and we found a great conflict upon the question of the effect and force of a collateral attack.<sup>1</sup> Much of the apparent conflict is due to the fact that in some jurisdictions there is a permanent judicial tribunal, not, indeed, always of superior jurisdiction, but, nevertheless, a permanent inferior judicial tribunal, to whom reports of committees, commissioners or viewers must be made, and by whom the reports must be confirmed. In all cases where there is such a permanent tribunal having jurisdiction to approve or reject a report, to hear and determine controversies, there is a tribunal competent to render a judgment strong enough to resist a collateral attack. Especially is this true where there is a right of appeal to a court of general superior jurisdiction.

The principal reason, as just indicated, why there is a difference in the practice, is that in many jurisdictions commissioners or committeemen are appointed for a special case and their powers end with the special appointment, while in other jurisdictions the general authority is committed to a board or body having a permanent organization, as a board of county commissioners, a board of supervisors, a board of county judges,

<sup>1</sup> We endeavored to show in the preceding chapter that in condemnation proceedings there are and must be adversary parties, and, if this be true, the controversy between them, when heard by a judicial tribunal or a *quasi* judicial tribunal, is a trial.



or a common council. It is obvious that there is an inherent difference between cases where the commissioners have only a special and transient existence, and cases where viewers or commissioners simply make a preliminary investigation and report the result to a tribunal of a definite character and permanent nature for confirmation or rejection. Much of the apparent conflict in the adjudged cases may be explained and dissipated by the reason we have stated. Where there is a tribunal with *quasi* judicial power, as a board of county commissioners or the like, there is much stronger reason for holding its judgment conclusive than there is where the tribunal is a special and transient one brought into existence by a special appointment for a particular case and ceasing to exist when the particular case is at an end. We can see no reason for extending the rule in a case such as that last mentioned, to cases belonging to the class in which effective action is taken by a permanent body or board with *quasi* judicial powers. Where there is such a body or board its judgment ought, on principle, to be protected against collateral attacks where there is general jurisdiction. The further conclusion is justly inferable that where there is such a body or board empowered to act upon a preliminary report, it may hear evidence and argument, and in short, conduct the investigation in accordance with the ordinary rules of procedure.

We can see no valid reason why the ordinary rules of procedure should not, as we have said, govern in jurisdictions where a permanent judicial tribunal finally decides the controversy, except, of course, in so far as the procedure is modified or changed by statute. The natural and reasonable presumption is that the legislature intended that such rules should prevail, since it is not reasonable to assume that the legislature meant to enter into details and embody in one statute a complete system of rights and remedies. It is far more reasonable to assume that the legislature intended that the statute should take its place in the great system of laws, to be aided by other statutes, and by the rules of law generally in force. But where there is a right of appeal given and provision made for the trial of the case *de novo*, errors in admitting or excluding evi-

dence are not available, for the appellate court does not sit merely as a court of errors.

Nor can we see any sufficient reason why the general rules of evidence and procedure should not be followed by the commissioners or appraisers on the preliminary hearing, unless, of course, different rules are prescribed by statute.<sup>1</sup> There is, however, as, indeed, there is upon most questions of procedure, much diversity of opinion as to whether commissioners and appraisers should hear evidence, but the better and sounder rule is that upon all questions of value and the like evidence should be taken.<sup>2</sup> Other courts hold that it is entirely discretionary with the appraisers to hear or refuse to hear testimony.<sup>3</sup> If facts are submitted to the tribunal it should be done in some legal method, and the opposing party should be allowed an opportunity to hear and meet them.<sup>4</sup> If secret communications are made to the tribunal, or unfair means resorted to for the purpose of influencing its decision, the judgment should not be allowed to stand. It may, indeed, be successfully assailed for fraud.<sup>5</sup>

It has been held that the commissioners may decide which party shall open and close, and that this decision is final.<sup>6</sup> This must necessarily be true so far as concerns the proceedings before the commissioners, even where there is a right of appeal, for the reason that the appellate court does not hear the case as a court of errors. The right to open and close the case is, however, a legal right, depending upon the application of settled principles of law, and no court, either of general or

<sup>1</sup> Albany, etc., R. R. Co. v. Lansing, 16 Barb. 68; Grand Junction, etc., Co. v. Middlesex, 14 Gray, 553; State v. Jersey City, 25 N. J. L. 309.

<sup>2</sup> Washington, etc., Co. v. Switzer, 26 Gratt. 661. We confess we can not conceive why commissioners or appraisers may not avail themselves of evidence just as a court may do.

<sup>3</sup> Penna. Co. v. Kieffer, 22 Pa. St. 131; St. Paul and Sioux City R. R. v. Covell, 2 Dak. 483; Lyman v. Burlington, 22 Vt. 131; Inhabitants v. Dilley, 24 N. J. L. 209.

<sup>4</sup> Patten's Pet., 16 N. H. 277; Peavey v. Wolfborough, 37 N. H. 286; Harris v. Woodstock, 27 Conn. 567; Lenox v. Knox, etc., Co., 62 Me. 322.

<sup>5</sup> New York, etc., Co. v. Church, 31 Hun. 440; Paul v. Detroit, 32 Mich. 108; Matter of Buffalo, etc., Co., 32 Hun. 289; Petition for Highway, 48 N. H. 433; Peckham v. School Dist., 7 R. I. 545.

<sup>6</sup> Albany, etc., R. R. Co. v. Lansing, 16 Barb. 68.

limited jurisdiction, can justly disregard the right of a party, but must give him the benefit of the right as the law secures it to him. The true rule upon this subject is that the land owner has a right to open and close the case where the sole question is the measure of damages.<sup>1</sup> Where, however, the party who instituted the proceedings is compelled to show that the street or road will be of public utility, then the burden is on him and he has the right to open and close the case.<sup>2</sup> It is evident from what we have said that the question as to which party has the burden of the issue and the right to open and close must depend, in a great degree, upon the pleadings in the particular case. A remonstrance, answer, or plea, may be so framed as to give the remonstrants or the defendants the right to open and close, or it may, by denying some allegation essential to the right to appropriate the property, cast the burden upon the petitioner or plaintiff, and thus give him the right to open and close.<sup>3</sup>

There are questions in highway cases which affect all the land owners, and in such a case their interests are joint and upon such questions there should be but one trial. Questions such as whether the road is of public utility, or the like, concern all the parties, and if more than one trial upon such questions should be permitted, great confusion and evil would result. If such a procedure were allowed, then it might be that in the same case there would be various findings, some in favor of the utility of the highway and some against it, and in

<sup>1</sup>Burt *v.* Wigglesworth, 117 Mass. 302; Minn., etc., *Co. v. Doran*, 17 Minn. 188; Oregon, etc., *Co. v. Barlow*, 3 Ore. 311; Conn., etc., *R. R. v. Clapp*, 1 Cush. 559; *The Indiana*, etc., *Co. v. Cook*, 102 Ind. 133; *Conwell v. Tate*, 107 Ind. 171; *Winnisinnet Co. v. Grueby*, 111 Mass. 543; *Omaha, etc., Co. v. Walker*, 17 Neb. 432; *Charleston, etc., Co. v. Blake*, 12 Rich. (S. C.) 634; *Neff v. Cincinnati*, 32 Ohio St. 215; *In the Matter of John and Cherry Sts.*, 19 Wend. 659.

<sup>2</sup>*Neff v. Reed*, 98 Ind. 341; *Schmied v. Keeny*, 72 Ind. 309. It is competent

for the land owner to oppose the proceedings upon the ground that there is no necessity for the seizure in all cases where the legislature requires a judicial determination of that question. *In re Minneapolis Terminal R. R.*, 38 Minn. 157, S. C. 36 N. W. R. 105.

<sup>3</sup>Where the constitution of the State requires that the necessity for appropriating the property shall be judicially determined, it is incumbent on the city to show the necessity, but it will be sufficient if it is shown that the seizure of the property will beautify and adorn the city.

that event no definite result could be finally reached. The just and practical rule is to try the question of the utility of the road in one proceeding and require all the parties to the proceeding to be bound by the judgment rendered. There are, however, questions in which the interests of the parties are separate and distinct, as, for instance, those concerning the amount of damages, and there may be instances where separate trials would be proper as to such questions. Where there are several joint owners of a parcel of land, or where there are owners of different interests in the land, as for instance a landlord and tenant, there can not be separate trials, for such persons are treated as the owners, and the sum of all their interests is taken to constitute ownership.<sup>1</sup>

Where the tribunal appointed to appraise property or to assess benefits and damages is a special and temporary one, the report must be prepared with scrupulous care, for it is necessary in such cases that all jurisdictional facts and all necessary matters of substance should appear in the report. For the reasons suggested at another place the report must be much more full and accurate in cases where the tribunal is a temporary one, than in cases where the report is made to a board of county commissioners, a board of supervisors, or the like, and the parties allowed an opportunity to give evidence upon all the questions involved. It is, however, necessary that the report should in all cases substantially comply with the requirements of the statute, and the omission of a material matter may often invalidate the proceedings.<sup>2</sup> The report must contain a statement of the decision of the commissioners, viewers, or appraisers upon all the questions submitted to them,<sup>3</sup> but in jurisdictions where the report is a mere preliminary one, omissions or errors will not be ground for dismissing or vacating the proceedings, since the remedy is by motion to set aside or vacate the report.<sup>4</sup> If the report is in

<sup>1</sup> *Kohl v. U. S.*, 91 U. S. 367.

<sup>2</sup> *O'Hara v. Pennsylvania*, 25 Pa. St. 445; *State v. Jersey City*, 25 N. J. L. 309; *State v. Scott*, 9 N. J. L. 17; *Thompson v. Multnomah County*, 2 Ore. 34; *Martin v. Rushton*, 42 Ala. 289; *Damrell v. Board of Supervisors*, 40 Cal. 154; *Windsor v. Fields*, 1 Conn.

279; *Gherkey v. Haines*, 4 Blackf. 159,

*Bryant v. Glidden*, 36 Me. 36; *Pierce v. County Com'rs*, 63 Me. 252; *Phila., etc., v. Cake*, 95 Pa. St. 139; *Matter of opening 28th Street*, 11 Phila. 436.

<sup>3</sup> *Butterworth v. Bartlett*, 50 Ind. 537; *Bowers v. Snyder*, 66 Ind. 340.

<sup>4</sup> *Brown v. Stewart*, 86 Ind. 377.

the nature of an interlocutory proceeding and is addressed to a permanent tribunal, formal omissions or mere clerical errors may be corrected by re-submitting the matter to the viewers or commissioners.<sup>1</sup>

Some of the courts apply very strict and rigid rules to the reports and hold them bad for errors and irregularities that seem to us not to affect the merits in any material degree.<sup>2</sup> Other courts, abating somewhat the strictness of the older decisions, declare a more liberal rule and hold that a substantial compliance with the requirements of the statute is all that is required,<sup>3</sup> none of the courts, however, go to the extent of holding a report or verdict sufficient which omits a matter which the statute declares it shall contain.

In strictness the report should contain a full and clear statement of the damages sustained by each parcel of property where several parcels are included in the assessment,<sup>4</sup> but it is not necessary that the items constituting the damages should be stated in detail, unless the statute requires that it should be done.<sup>5</sup> The safe rule is to state whether damages are allowed or denied, but upon this point there is a diversity of opinion, some of the courts holding that the failure to make such a statement will be fatal to the report or verdict,<sup>6</sup> while the holding of other courts is, that, if the report or verdict is silent, it will

<sup>1</sup> *Missouri Pacific Ry. Co. v. Hays*, 15 Neb. 224.

<sup>2</sup> *Rout v. Montjoy*, 3 B. Monr. 300. See *Wood v. Campbell*, 14 B. Monr. 399; *Connecticut River R. R. Co. v. Clapp*, 1 Cush. 559; *State v. English*, 22 N. J. L. 291.

<sup>3</sup> *Reitenbugh v. Chester Valley*, 21 Pa. St. 100. Compare *Hunt v. Smith*, 9 Kan. 137; *Matter of New York and West Shore R. R. Co.*, 33 Hun. 293; It is held in the case last cited that where the statute requires a report of the minutes of the testimony, the commissioners must settle the correctness of the minutes, and not the court to which the report is made. In *Matter of Rondout, etc., R. R. Co.*, 5 Lans.

298, it is held that the evidence taken by the commissioners may be attached to the report as an exhibit.

<sup>4</sup> *New Washington Road*, 23 Pa. St. 485; *Dolphin v. Pedly*, 27 Wis. 469.

<sup>5</sup> *Ohio and Pennsylvania R. R. Co. v. Wallace*, 14 Pa. St. 245; *Ford v. County Commissioners*, 64 Me. 408; *Michigan Air Line, etc., R. R. Co. v. Barnes*, 44 Mich. 222. If the statute expressly or impliedly requires a specification it must be made. *California, etc., R. R. Co. v. Frisbie*, 41 Cal. 356; *Robinson v. Robinson*, 1 Duvall, 162.

<sup>6</sup> *Commissioners v. Durham*, 43 Ill. 86; *State v. Cooper*, 23 N. J. L. 381. See, *Fitzpatrick v. Pennsylvania R. R. Co.*, 10 Phila. 107.

be held to deny the right of the property owner to damages.<sup>1</sup> The principle which rules in cases where benefits are assessed is substantially the same as that which prevails respecting the statement of damages, and it is necessary to describe with particularity the property assessed. There is, indeed, more reason for requiring a full description of property upon which benefits are assessed than there is for requiring such a description of property where only damages are assessed, for the property assessed for benefits may be sold to pay the assessment, and the assessment may thus become the foundation of a title.<sup>2</sup>

Where the statute requires that the question of public necessity, public utility, or the like, shall be passed upon by a jury, by viewers, by a committee, by appraisers, or by commissioners, it is essential that a finding should be made and that it should be embodied in the report or verdict.<sup>3</sup> It is probably not necessary that the finding should follow the exact words of the statute,<sup>4</sup> but it is necessary that it should substantially cover the points designated by the statute, and it is necessary in all cases that the report or verdict should fairly exhibit the conclusions of the viewers, commissioners, or jury. It will not be sufficient to find upon some resembling point; thus, where the statute requires that the finding shall show the necessity for the appropriation it is not sufficient to state that it is for a public use.<sup>5</sup> In other cases it was held that where the statute required viewers to state in their report the conveniences and in-

<sup>1</sup> *Howland v. County Commissioners*, 49 Me. 143; *North Reading v. County Commissioners*, 7 Gray, 109. See, *Childs v. County of Franklin*, 128 Mass. 97; *Chace v. Fall River*, 2 Allen, 533.

<sup>2</sup> *Zigler v. Menges*, 121 Ind. 99; *Boatman v. Macy*, 82 Ind. 490. It is held, however, that it is not necessary to describe all the lands which will be affected by a public improvement, but it is generally held that it is necessary to describe the parcels benefited or damaged. *Baker v. Clem*, 102 Ind. 109; *Zigler v. Menges*, *supra*. It is obvious that much must

depend upon the provision of the statute under which the proceedings are prosecuted. See, generally, upon the subject of stating benefits and damages. *State v. Leslie*, 30 Minn. 533; *Illinois, etc., Co. v. Mayrand*, 93 Ill. 591; *In re Road in O'Hara Township*, 87 Pa. St. 356.

<sup>3</sup> *Bass v. Elliott*, 105 Ind. 517; *Arnold v. Decatur*, 29 Mich. 77.

<sup>4</sup> *Hunter v. Newport*, 5 R. I. 325; *Pierce v. Southbury*, 29 Conn. 490; *Cushing v. Gay*, 23 Me. 9.

<sup>5</sup> *McClary v. Hartwell*, 25 Mich. 139.

conveniences of the proposed highway, their failure to do so was fatal to the report.<sup>1</sup>

In some jurisdictions the statute commits to the judgment of the viewers the question of the necessity or utility of the proposed highway, and in such jurisdictions a report of the viewers that the proposed way will not be of public utility is conclusive against the petitioners and ends the case.<sup>2</sup> It seems, however, that such a report will not preclude the petitioners from instituting new proceedings. It is the general rule that a report in favor of the utility or necessity of the proposed road does not settle the question as against the defendants or remonstrants, but this is so much a matter of statutory regulation that the best that can be done is to state the rule in a very general way.

Where there are different parcels or lots of land belonging to different persons, the tract of each owner should be separately considered and damages awarded and stated upon that basis.<sup>3</sup> It is the safer and better practice, even where several parcels of land are owned by one person, to state the damages to each parcel or lot and not merely state the amount in gross,<sup>4</sup> but upon this point there is a diversity of opinion, some of the courts holding that it is not necessary to state specifically the damages to each lot or parcel.<sup>5</sup> Where a lot or parcel is owned by several persons jointly, it is proper to embody all the names in one statement and to state the amount of damages in gross.<sup>6</sup>

<sup>1</sup> *Daviess v. County Court*, 1 Bibb. 514; *Fletcher's Heirs v. Fugate*, 3 J. J. Marshall, 631; *Peck v. Whitney*, 6 B. Mon. 117; *Wood v. Campbell*, 14 B. Mon. 422.

<sup>2</sup> *Wilmington, etc., Co. v. Dominguez*, 50 Cal. 505. The general rule stated in the text is asserted in the cases of *Jones v. Duffey*, 119 Ind. 440, *McKee v. Gould*, 108 Ind. 107, and *Bowman v. Jobs* (Ind.), MSS. op.

<sup>3</sup> *Rusch v. Milwaukee, etc., Ry. Co.*, 54 Wis. 136; *Honenstine v. Vaughan*, 7 Blackf. 520; *Com. v. Coombs*, 2 Mass. 489; *Harris v. Howes*, 75 Me. 436; *State v. Fischer*, 26 N. J. L. 129.

<sup>4</sup> *Rentz v. Detroit*, 48 Mich. 544,

*Smith v. Trenton, etc., Co.*, 17 N. J. L. 5; *Ruppert v. C. O. St. J. & H. R. R. Co.*, 43 Ia. 490. See *Chesapeake and Ohio Co. v. Hoyer*, 2 Gratt. 511.

<sup>5</sup> *Kankakee, etc., Co. v. Chester*, 62 Ill. 235; *Sherwood v. St. Paul, etc., R. Co.*, 21 Minn. 127; *Tidewater Canal Co. v. Archer*, 9 Gil. & J. 479; *Ross v. Elizabethtown, etc., Co.*, 20 N. J. L. 230.

<sup>6</sup> *Thornton v. Town, etc., of North Providence*, 6 R. I. 433; *Pittsburgh, etc., Co. v. Hall*, 25 Pa. St. 336; *Snoddy v. County of Pettis*, 45 Mo. 361. See *Cox v. Mason and Fort Dodge R. Co.*, 77 Ia. 20, 25.

Some of the courts enforce a strict and technical rule in the matter of naming parties in the report or verdict,<sup>1</sup> but others lay down a much more liberal rule.<sup>2</sup> It seems to us that where the land is fully described there is no sufficient reason for requiring technical accuracy; especially is there little reason for requiring a high degree of accuracy where the names are correctly set forth in the petition, answer, remonstrance or other papers in the proceeding. Reasonable certainty is all that should be required, and where the record makes it reasonably certain what person is intended, it should be considered sufficient. It is, of course, essential that the owners should be made parties to the proceeding in some appropriate mode, but in cases where they are parties there is no good reason why an error in naming them in the report or verdict should vitiate the proceedings. Where, however, the owners are named for the first time in the report or verdict of viewers or commissioners, there is good reason for requiring that names be given with a very considerable degree of accuracy. In accordance with the rule which prevails in other branches of the law, it is held that where the owner is unknown it will be sufficient to describe the lot or parcel of land and state that the owner is unknown.<sup>3</sup>

Where the statute requires that objections to the report of viewers or commissioners shall be made within a designated time or in a prescribed mode, the failure to make the objections in the time designated or in the mode indicated will preclude the party from availing himself of any objections except such as go to the jurisdiction.<sup>4</sup> We suppose, however, that a report may be so uncertain and defective as not to authorize any valid proceedings, and that, in such a case, a failure to object within

<sup>1</sup> *Kearsley v. Gibbs*, 44 N. J. L. 169; *State v. Woodruff*, 36 N. J. L. 204; *Vawter v. Gilliland*, 55 Ind. 278; *Neal v. Knox, etc., Co.*, 61 Me. 298; *Matter of William and Anthony's Streets*, 19 Wend. 678.

<sup>2</sup> *Todemeir v. Aspinwall*, 43 Ill. 401; *Peavy v. Wolfborough*, 37 N. H. 286; *Red River, etc., Co. v. Sture*, 32 Minn. 95.

<sup>3</sup> *Com. v. Greab Barrington*, 6 Mass.

<sup>4</sup> *Bryant v. Knox and Lincoln R. R. Co.*, 61 Me. 300; *Matter of Clear Lake Water Co.*, 48 Cal. 586; *Thayer v. Burger*, 100 Ind. 262; *Munson v. Blake*, 101 Ind. 78; *Morgan Civil Township v. Hunt*, 104 Ind. 590; *Case of the Mayor of New York*, 16 Johns. 231. See *Wind-sor v. Field*, 1 Conn. 279; *In re Kensington and Oxford Turnpike*, 97 Pa. St. 260.



the time fixed by statute would not necessarily operate as a waiver, but it is seldom safe to delay beyond the statutory limitation, for the general rule is, that objections not presented within the time fixed by the statute are waived. It would require an exceedingly strong and clear case to prevent the force and operation of this general rule. Objections, to be available on appeal, must, ordinarily, be made in the tribunal of original jurisdiction, for the prevailing rule is, that only such specific objections as were made in that tribunal will be considered by the appellate court.<sup>1</sup> It is within the power of a court of general jurisdiction to relieve a party who has failed to object within the time limited, or in the mode indicated by the law, where it is clearly made to appear that there was fraud, accident or the like, and that he was himself free from fault or negligence.<sup>2</sup>

Defects in a report of viewers or commissioners may often be remedied by amendment, and where the defects are of such a character that they can be cured by amendment, the report may be recommitted to the commissioners or viewers by order of the court.<sup>3</sup> As a general rule the court has no power to correct or amend the report or verdict,<sup>4</sup> but it may sometimes direct its amendment by the viewers or commissioners.<sup>5</sup> In recommitting the report to the viewers or commissioners the court may give instructions as to the rules which should be observed in ascertaining and estimating the damages, but, as it

<sup>1</sup> *Metly v. Marsh* (Ind.), 23 N. E. R. 702; *Hardy v. McKinney*, 107 Ind. 364, S. C. 8 N. E. R. 232. See, generally, *Chicago, etc., v. Groner* (Kan.), 21 Pac. R. 779; *Ellsworth, etc., Co. v. Maxwell*, 39 Kan. 651, S. C. 18 Pac. R. 819; *Meranda v. Spurlin*, 100 Ind. 380; *Lockwood v. Gregory*, 4 Day, 407; *Washington, etc., Co. v. Switzer*, 26 Gratt. 661; *United States v. Reed*, 56 Mo. 565; *Whitely v. Mississippi, etc., Co.*, 38 Minn. 523, S. C. 38 N. W. R. 753.

<sup>2</sup> *Road to Ewing's Mill*, 32 Pa. St. 282; *Breitweiser v. Fuhrman*, 88 Ind. 28; *Romingers v. Simmons*, 88 Ind. 453. See, also, *Robbins v. Omaha,*

*etc.*, R. R. Co. (Neb.), S. C. 42 N. W. R. 905.

<sup>3</sup> *New Orleans, etc., R. R. v. Zerinegue*, 23 La. Ann. 521; *People v. White*, 59 Barb. 666; *Pueblo, etc., Co. v. Rudd*, 5 Col. 270; *Waterbury v. Darien*, 9 Conn. 252; *Ives v. East Haven*, 48 Conn. 272; *Green v. East Haddam*, 51 Conn. 547; *Coleman v. Andrews*, 48 Me. 562; *Potts' Appeal*, 15 Pa. St. 414.

<sup>4</sup> *Conwell v. Tate*, 107 Ind. 171, *Crawford v. Valley R. R. Co.*, 25 Gratt. 467. But there are exceptions to the general rule. *Matter of New York Central, etc., R. R. Co.*, 35 Hun. 306.

<sup>5</sup> *Long v. Talley*, 91 Mo. 505; *Spring Brook Road*, 64 Pa. St. 451.

is held, it is not competent for the court to direct what amount shall be allowed, nor is it competent for the court to direct that a specific sum be fixed upon any of the items of damages.<sup>1</sup>

The right to appropriate land for roads and streets, resting, as it does, upon statutory authority, is destroyed by an unconditional repeal of the statute, except in cases where vested rights have been acquired and cases in which the proceedings have culminated in a final judgment.<sup>2</sup> It is usual to protect pending proceedings by a saving clause, but where there is an unqualified repeal of the statute authorizing the proceedings, they fall with the repeal of the statute upon which they are founded.<sup>3</sup> But changes in the mode of procedure, or in the form of the remedy, do not necessarily put an end to pending proceedings, for if it appears that the legislature intended to preserve the right and continue the authority, the proceedings may still be prosecuted.<sup>4</sup> Statutes affecting the remedy, as a general rule, take effect at once and operate upon pending proceedings, so that all proceedings subsequent to the taking effect of the new statute must be conducted in accordance with its provisions, but such a statute does not necessarily have a retrospective effect.<sup>5</sup> In accordance with this general rule it was held by

<sup>1</sup> Matter of Henry Street, 7 Cowen, 400. See upon the general subject of procedure in cases where reports are recommitted, Patten's Petition, 16 N. H. 277; Stinson v. Dunbarton, 46 N. H. 385; Road in Indiana County, 51 Pa. St. 296; Georges Creek, etc., Co. v. New Central, etc., Co., 40 Md. 425; Varner v. Martin, 21 W. Va. 534; Lyman v. Burlington, etc., Co., 22 Vt. 131; Hannibal, etc., Co. v. Rowland, 29 Mo. 337; New Orleans Dryades St., 11 La. Ann. 458; Cambria St., 75 Pa. St. 357.

<sup>2</sup> People v. Supervisors of Westchester, 4 Barb. 64.

<sup>3</sup> Hampton v. Com., 19 Pa. St. 329; Stephenson v. Doe, 8 Blackf. 508; Butler v. Palmer, 1 Hill, 324; Road in Bucks County, 3 Wharton (Pa.), 105; Road from Bough Street, 2 Sergt. & R.

419; Milner's Case, 3 Burr. 1456; Williams v. County Comm'rs of Lincoln County, 35 Me. 345; French v. Owens, 5 Wis. 112. See Burrows v. Vandevier, 3 Ohio, 383; People v. Board, 33 Cal. 487.

<sup>4</sup> Mitchell, J., thus stated the rule: "But where the new legislation does not impair or take away the previously existing right, nor deny a remedy for its enforcement, but merely modifies the proceedings while providing a substantially similar remedy, the jurisdiction continues under the forms directed by the last act, in so far as the acts are different." Mayne v. Board of Comm'rs of Huntington County, Ind., MSS. op., April 4th, 1890.

<sup>5</sup> Uwchlan Township Road, 30 Pa. St. 157.

the supreme court of Pennsylvania that where the statute in force at the time the proceedings were commenced provided for six viewers, but was amended during the pendency of the proceedings so as to require three viewers, the proper course was to proceed under the later statute and appoint three viewers as it provided.<sup>1</sup> It often happens that the later statute only modifies the earlier, leaving it in part in full force, and in such cases both statutes must be regarded, for in so far as the earlier statute is unchanged the proceedings must conform to its provisions, but in so far as it is changed, the later statute must be followed. It is held that where the new statute is invalid the old remains in force and will authorize proceedings for the appropriation of land.<sup>2</sup>

<sup>1</sup>The Hickory Tree Road, 43 Pa. St. 139. In this case the question was well considered, and it was said that it is only where the jurisdiction is taken away that the repealing statute puts an end to pending proceedings. The decided cases support this doctrine. *Bohlman v. Green Bay, etc., Co.*, 40

Wis. 157; *Emerson v. Western Union, etc., Co.*, 75 Ill. 176; *Colony v. Dublin*, 32 N. H. 432; *Boston, etc., Co. v. Cilley*, 44 N. H. 578.

<sup>2</sup>*Campau v. Detroit*, 14 Mich. 276; *Shepardson v. Milwaukee, etc., Co.*, 6 Wis. 605. See *State, ex rel. Law, v. Blend (Ind.)*, 23 N. E. R. 511.

## CHAPTER XVI.

### REVIEW BY APPEAL AND CERTIORARI.

It is probably true that the right of appeal is purely statutory, and that, unless some statute authorizes an appeal, the judgment of a court of competent jurisdiction is final, but this rule should be very carefully applied in highway cases.<sup>1</sup> In such cases the statutes should be liberally construed in favor of the right and every reasonable intendment made in favor of its existence. The power of seizing property is a high one, and the assessment of benefits and damages often involves very important and difficult questions, and it should not be held, where it can be avoided, that the decision of the tribunal of original jurisdiction can not be appealed from, since it ought not to be presumed that the legislature meant to place the decision of a tribunal of the rank of those to which original jurisdiction is usually given beyond review by higher courts. The reasonable presumption is, that it was not the legislative intention to cut off the right of appeal.

In conformity to these views we find the courts generally favoring the right of appeal, and extending the statutes as far as it is in their power to do in order to secure and preserve the right. Wherever there is a general statute giving a right of appeal, the courts, unless it is forbidden by other statutory provisions, will extend the right to highway cases.<sup>2</sup> Some of the courts have, indeed, gone much farther and have adjudged that the legislature can not cut off the right of appeal by an express enactment, but this ruling is not in accordance with the weight of authority.<sup>3</sup> The rule which the adjudged cases gen-

<sup>1</sup> *Sims v. Hines* (Ind.), 23 N. E. R. 73 Ind. 1; *Yelton v. Addison*, 101 Ind. 515; *Huntington Co. v. Kauffman* (Pa.), 58; *Lawrenceburg, etc., Co. v. Smith*, 17 Atl. R. 595.

3 Ind. 253.

<sup>2</sup> *Howard v. Shaw*, 126 Ill. 53, S. C. 18 N. E. R. 313; *Bridge v. Hampton*, Louis, etc., *Co. v. Lux*, 63 Ill. 523, 47 N. H. 151; *Hamilton v. Ft. Wayne*, overruling *Coon v. Mason*, *supra*.

<sup>3</sup> *Coon v. Mason Co.*, 22 Ill. 666. St.

erally lay down is, that the legislature may not only declare what questions shall be tried on appeal, but that it may deny any appeal.<sup>1</sup>

Where the statute provides that designated questions only shall be tried on appeal, no others can be tried. As the right to grant or withhold an appeal is a matter for legislative decision it must necessarily follow that the legislature can conclusively determine what questions may be tried on appeal.<sup>2</sup> The provisions of the statute regulating the mode of prosecuting appeals and prescribing rules of practice can not be disregarded, for they are of controlling force. Where an appeal is expressly or impliedly given the courts will look to other statutes regulating appeals in analogous cases, and give them application to the particular case.<sup>3</sup> Where the statute prescribes the practice on appeal the statutory mode must, of course, be pursued, but where no mode is prescribed by the statute and there is a right of appeal, the rules of practice which prevail in similar cases will be adopted. It is, indeed, the general rule that in all cases where there is no statutory provision to the contrary, legal controversies will be tried in accordance with the general rules of practice.<sup>4</sup> This must necessarily be so, for

<sup>1</sup> Matter of State Reservation, 102 N. Y. 734; Southern R. R. v. Ely, 95 N. C. 77; Appeal of Houghton, 42 Cal. 35; Lawrenceburgh, etc., Co. v. Smith, 3 Ind. 253.

<sup>2</sup> Barr v. Stevens, 1 Bibb. 292; Canyonville, etc., Co. v. County, 5 Ore. 280; Spaulding v. Milwaukee, etc., Co., 57 Wis. 304; Haswell v. Vermont, etc., R. R., 23 Vt. 228; Sims v. Hines (Ind.), 23 N. E. Rep. 515.

<sup>3</sup> Bridge v. Hampton, 47 N. H. 151; Warne v. Baker, 24 Ill. 351; County v. Harvey, 18 Ill. 364; Peters v. Hastings, etc., R. R. Co., 19 Minn. 260; Twombly v. Madbury, 27 N. H. 433; Dubuque v. Crittenden, 5 Ia. 514; West v. McGuire, 43 Barb. 198; Gifford v. Republican, etc., Co., 20 Neb. 538; County of Peoria v. Harvey, 18 Ill. 364.

<sup>4</sup> Ordinarily, only parties to the proceedings can appeal. Barr v. Stevens, 1 Bibb. 292; Cedar Rapids, etc., Co. v. Chicago, etc., Co., 60 Ia. 35; Canyonville, etc., Co. v. County of Douglass, 5 Ore. 280; Wingfield v. Henshaw, 3 H. & M. 245. Where there is a transfer of title pending the proceedings, the grantee may appeal. Connable v. Chicago, etc., Co., 60 Ia. 27. But it is held that if transfer is subsequent to the award he can not. Losch's Appeal, 109 Pa. St. 72. Joint owners should appeal jointly. Watson v. Milwaukee, etc., Co., 57 Wis. 332. An appeal will not, as a general rule, avail one whose rights are not injuriously affected. State v. Richmond, 26 N. H. 232; Supervisors v. Gorrell, 20 Gratt. 484; Wellington, petitioner, 16 Pick. 87; Clifford v. Eagle, 35 Ill. 444. It is

no statute can be justly considered as standing entirely alone, and the reasonable presumption is that the legislature did not undertake in every statute to define rights and also prescribe rules of practice, but that it meant, where no contrary intention is signified, to permit the application of ordinary general rules of procedure.

As a general rule, a case carried up by appeal does not go into the intermediate appellate court as upon a writ of error, but is there to be tried *de novo*.<sup>1</sup> In the court to which the case is directly taken evidence is heard as if the case had originated in that court, and, indeed, all the proceedings so far as concerns the trial are conducted as if the case had been commenced in that court.<sup>2</sup> It is not so, however, as regards the pleadings. There is a radical distinction between the mode of pleading and the mode of procedure. In general a party must make in the court of original jurisdiction all the questions which he desires to make on appeal, for ordinarily it is only such questions as are made in the court of original jurisdiction that will be entertained on appeal. This rule can not, of course, apply to questions respecting the subject of the court's jurisdiction, but it does apply, in the absence of statutory provisions to the contrary, to all

upon the principle that only those can complain who have been injured, that it is held that one who has himself received notice can not complain that others have not. *Nichols v. Salem*, 14 Gray, 490; *Barnett v. State*, 15 Ala. 289; *Leavitt v. Eastman*, 77 Me. 117; *People v. Highway Comm'rs*, 14 Mich. 528; *Private Road*, 112 Pa. St. 183; *Grimes v. Coe*, 102 Ind. 406; *Carr v. Boone*, 108 Ind. 241. But where the failure to give notice will prevent the laying out of the way, the rule fails. *Wright v. Wilson*, 95 Ind. 408. As a general rule taxpayers do not have such an interest as will authorize them to resist the proceedings by appeal or otherwise. *Supervisors v. Gorrell*, 20 Gratt. 484; *Southern Boulevard*, 3 Abb. Pr. (N. S.) 447. But there may be cases in which taxpayers may intervene, as, for

instance, where there is an attempt to illegally burden the county or city with great expense. *People v. Courtelyou*, 36 Barb. 164; *Appleby Road*, 1 Grant, 443; *State v. Woodruff*, 36 N. J. L. 204; *State v. Emmons*, 24 N. J. L. 45. In such a case taxpayers may justly be said to be "parties aggrieved."

<sup>1</sup> *Kemp v. Smith*, 7 Ind. 471; *Hardy McKinney*, 107 Ind. 364; *Hughes v. Beggs*, 114 Ind. 427; *Mississippi, etc., Co. v. Rousseau*, 8 Ia. 376; *York Co. v. Fewell*, 21 S. C. 106; *Dunlap v. Mt. Sterling*, 14 Ill. 251; *Blize v. Castlio*, 8 Mo. App. 290; *Miller v. Prairie Du Chien R. R. Co.*, 34 Wis. 533. But this is not always so. *Rawlings v. Biggs*, 85 Ky. 251, S. C. 3 S. W. R. 147.

<sup>2</sup> *Kellogg v. Price*, 42 Ind. 360; *Sigafoos v. Talbott*, 25 Ia. 214, *Hord v. Nashville, etc., Co.*, 2 Swan, 497.

other questions.<sup>1</sup> The justice of this rule where the statute affords an opportunity to present questions in the court of original jurisdiction is apparent, but where no such opportunity is presented the reason for the rule fails, and so should the rule itself. If a party has an opportunity to present questions in the first instance it is his own fault if he does not do so, but where no such opportunity is given him he is not in fault, and no man free from fault ought to be deprived of a legal right. It is not meant by the rule to which we have referred that every question shall be specifically and with technical accuracy presented in the first instance; all that can justly be required is that the question shall be so made as to inform the tribunal and the adverse party of its nature. Except in cases where the statute expressly provides that a certain prescribed mode shall be pursued, it is enough to bring the question before the court in some general and appropriate method; where, however, the statute requires that the matter shall be stated as a condition precedent to the right to proceed, or specifically provides what course shall be pursued, it must be obeyed.

Where a time is fixed within which an appeal may be taken, an appeal not taken within the time limited will be unavailing. Where a bond is required it is deemed a condition precedent to the right of appeal. Generally the party who appeals is not required to give notice of his appeal, since if he moves in time and gives the requisite bond, the adverse party must take notice. As long as the time remains open for an appeal and no notice is required by statute, the adverse party must take notice of the appeal.<sup>2</sup> Where, however, the statute requires that notice shall

<sup>1</sup> *People v. Chapman*, 127 Ill. 387, S. C. 19 N. E. 872; *Norfolk, etc., Co. v. Ely*, 101 N. C. 8, S. C. 7 S. E. R. 476; *Green v. Elliott*, 86 Ind. 53; *Sutherland v. Holmes*, 78 Mo. 399; *Briggs v. Labette Co.*, 39 Kan. 90, S. C. 17 Pac. R. 331; *Muire v. Falconer*, 10 Gratt. 12; *Whiteley v. Mississippi, etc., Co.*, 38 Minn. 523, S. C. 36 N. W. 345; *Harper v. Miller*, 4 Iredell L. 34; *Horton v. Norwalk*, 45 Conn. 237; *South Carolina, etc., Co. v. Blake*, 9 Rich. 228. Matter

of opening of Spuyten, etc., Park, 67 How. Pr. R. 341; *Field v. Vermont, etc., Co.*, 4 Cush. 150; *Palmer v. Highway Com'rs*, 49 Mich. 45; *Bachelor v. New Hampton*, 60 N. H. 207.

<sup>2</sup> A contrary doctrine seems to have been held in *Commissioners v. Claw*, 15 Johns. 537, but we think this ruling erroneous. If the party does all the law requires him to do, the courts can not impose an additional burden upon him. If no notice is prescribed the

be given, an appeal will be without avail, unless the party who appeals gives the notice prescribed.<sup>1</sup> Where a notice is provided for it becomes a condition of the right of appeal, and as all the prescribed conditions must be complied with, it is obvious that the failure to give notice will be fatal unless there is a waiver.<sup>2</sup>

Where the appeal affects only individual interests there may be separate appeals,<sup>3</sup> and, indeed, only separate appeals can properly be taken in such cases. Parties jointly interested may, of course, join in one appeal. If a party is the owner of several parcels of land affected by a single proceeding he need take only one appeal.<sup>4</sup>

An appeal is a direct attack upon the proceedings from which it is prosecuted. It directly challenges all the material steps taken in the case except where objections are expressly or impliedly waived, and except as to questions where the decision of the inferior tribunal is by law made conclusive. If objections to the notice are properly made and well taken the whole proceeding will fail. If a notice, properly and reasonably questioned, is defective in any material particular it will fall before a direct attack, although it would repel a collateral one. It is, therefore, important to properly object to the notice in the tribunal of original jurisdiction, otherwise the objection may be waived. While an appeal is a direct attack upon the proceedings from which it is prosecuted, still it does not bring in question mere immaterial irregularities,<sup>5</sup> nor does it authorize objec-

cours have no power to prescribe one, and the effect would be to deny an appeal in all cases where no notice is prescribed, and this can not be the law.

<sup>1</sup> *Butte Co. v. Boydston*, 68 Cal. 189; *Maxwell v. LaBruce*, 68 Ia. 689; *Klein v. St. Paul, etc., R. R.*, 30 Minn. 451; *Neff v. Chicago, etc., Co.*, 14 Wis. 370; *Burns v. Spring Green*, 56 Wis. 239. Where a bond is required it must be such as the statute prescribes and must be filed within the time designated. *Weir v. St. Paul, etc., Co.*, 18 Minn. 185; *McVey v. Heavenridge*, 30 Ind. 100; *Leffel v. Obenchain*, 90 Ind. 50. See as to sufficiency of notice and ser-

vice thereof. *Hartman v. Bellville, etc., R. R. Co.*, 64 Ill. 24; *Larson v. Superior, etc., R. R. Co.*, 64 Wis. 59.

<sup>2</sup> Notice may be waived by voluntarily appearing. *East Saginaw, etc., R. R. Co. v. Benham*, 28 Mich. 459.

<sup>3</sup> See *Washburn v. Milwaukee, etc., R. R. Co.*, 59 Wis. 364; *Lance v. Chicago, etc., R. R. Co.*, 57 Ia. 636.

<sup>4</sup> *Weyer v. Milwaukee, etc., Co.*, 57 Wis. 379; *Larson v. Superior, etc., Co.*, 64 Wis. 59, S. C. 22 Am. & Eng. R. R. Cas. 165.

<sup>5</sup> See *Booker v. Venice, etc., R. R. Co.*, 101 Ill. 333; *Detroit, etc., R. R. Co. v. Crane*, 50 Mich. 182.



tions that were not made at the proper time even though these objections may go to the question of the jurisdiction of the person.<sup>1</sup>

It is, as we have suggested, not every question tried in the inferior tribunal that is open to contest on appeal. A general rule of law precludes the court to which the appeal is taken from reviewing the judgment of the inferior tribunal upon matters committed to its discretion.<sup>2</sup> In many instances the statute provides that the decision of the tribunal which first assumes jurisdiction shall be conclusive upon certain designated questions, and whenever this is done, either expressly or impliedly, the question must, of course, be deemed conclusively adjudicated.<sup>3</sup> It is, perhaps, true, that there are questions which the legislature can not conclude the parties from litigating, but these can only be questions affecting the jurisdiction,<sup>4</sup> since, as we have seen, the legislature has plenary power to regulate appeals, and so long as it keeps within the limits of the constitution its decisions can not be reviewed by the courts. If it expressly provides that only designated questions shall be tried on appeal, the question becomes one of power and is to be solved by reference to the provisions of the constitution. If no provision of that instrument is violated, nothing remains for the courts but to enforce the statute as it is written, for they can not invade the legislative domain.

A land owner may estop himself from prosecuting an appeal. If he does any act inconsistent with the right of appeal and in confirmation of the proceedings upon the faith of which other interested parties have acted, he can not appeal, if to do so would work injury to those who have acted upon his conduct affirming the validity of the proceedings.<sup>5</sup> Thus, if one who

<sup>1</sup> *Hughes v. Beggs*, 114 Ind. 427; *Atchison, etc., Co. v. Patch*, 28 Kan. 470.

<sup>2</sup> *Kirkpatrick v. Taylor*, 118 Ind. 329; *Weaver v. Templin*, 113 Ind. 298; *Leeds v. City*, 102 Ind. 372; *Davis v. Mayor, I Duer*, 451; *Smith v. Corp.*, 20 How. 135.

<sup>3</sup> *Taber v. Ferguson*, 109 Ind. 227; *Taber v. Grafmiller*, 109 Ind. 206.

<sup>4</sup> Where there is no jurisdiction there is no court, and if no court, no "due process of law."

<sup>5</sup> *Baltimore, etc., Co. v. Johnson*, 84 Ind. 420; *Rentz v. Detroit*, 48 Mich. 544; *Matter of New York, etc., Co.*, 98 N. Y. 12.

has notice of the proceedings and an opportunity to resist them should accept the damages assessed, and permit the highway commissioner to expend money to fit the road for travel, he would be estopped from afterwards prosecuting an appeal.<sup>1</sup> Where, however, his act brings him nothing of value, and does not induce another to part with something of value, he will not be estopped from attacking proceedings taken in a matter over which the tribunal had no jurisdiction.<sup>2</sup> A waiver of the right of appeal may arise from a failure to comply with the law although no injury may be done to any of the interested parties, but an estoppel can not exist unless the party has expressly or impliedly affirmed the proceedings, and the withdrawal or denial of his affirmation would substantially prejudice the rights of others who had a right to rely upon his conduct and who did, in fact, act upon it. The rule does, indeed, go somewhat further, for if a party accepts a benefit from the judgment of any tribunal he can not, as a general rule, be heard to aver that it was erroneous. This is a well established general rule and we can not conceive any reason why it should not apply to condemnation proceedings, since the acceptance of a benefit fairly implies that the land owner will not question the validity of the judgment which conferred the benefit he has accepted.<sup>3</sup>

The question of estoppel, it is evident, must be presented by an appropriate pleading in the court to which the appeal carries the case. It is not a matter of which the court can take notice without a pleading, nor is it, as a general rule, a question which arises in the record made by the inferior tribunal, although it is possible that there may be cases in which that record would present the facts.

Where no interests are affected except those of the party by whom the appeal is taken he has a right to dismiss the appeal.<sup>4</sup>

<sup>1</sup> *People v. Mills*, 109 N. Y. 69.

<sup>2</sup> *Langworthy v. City*, 13 Ia. 86; *Buell v. Ball*, 20 Ia. 282; *Strosser v. City*, 100 Ind. 443.

<sup>3</sup> *Mississippi, etc., Co. v. Byington*, 14 Ia. 472; *Hawley v. Harrall*, 19 Conn. 142; *Murphy v. Spaulding*, 46 N. Y. 556; *Telch v. Gilman*, 22 Vt. 38; *Burns*

*v. Milwaukee, etc., Co.*, 29 Wis. 450; *Baltimore, etc., Co. v. Johnson*, 84 Ind. 420; *Sterne v. Vert*, 108 Ind. 232.

<sup>4</sup> See as to costs where the land owner appeals, and the party seeking the condemnation abandons or dismisses the proceedings. *St. Louis, etc., R. R. Co. v. Martin*, 29 Kan. 750.

It has, however, been held that where both parties are given a right to appeal within a limited time, and one does appeal, he can not dismiss the appeal after the time limited, since to permit him to do so would deprive the other party of his right.<sup>1</sup> This decision is of doubtful soundness, for the party who appeals does not represent to the other that he will press the appeal to a conclusion. We think that the right to dismiss exists, unless it is made to appear that the appealing party has acted in bad faith. If the rule laid down in the case referred to is sound, then a party might be kept in court long after he became convinced that his appeal was hopeless. Doubtless the court might, upon a proper showing, retain the case, but the party who prayed the appeal would certainly have a right to withdraw as an appellant.

The court on appeal can not try questions respecting any other road or street than the one involved in the proceedings from which the appeal is prosecuted. Its judgment must be upon the way described in the petition or application, and it must either sustain the proceedings establishing that way or annul them; it can not substitute another road or street for that described in the original application or petition.<sup>2</sup> An unimportant deviation from the way described in the petition will not make the judgment or order erroneous but one which changes in a material particular the dimensions or course of the way will do so.<sup>3</sup>

The officer charged with the duty of executing the order or judgment of the court is not bound to ascertain whether the proceedings which led to the judgment are regular, but he is protected if the process issued to him is regular on its face and it appears that the court which rendered the judgment had jurisdiction.<sup>4</sup> In executing the process he must, however, proceed in compliance with the law, and if he departs from it in any material particular, he will be deemed a trespasser from the beginning.<sup>5</sup> An order made in a case over which the court had

<sup>1</sup> *Brown v. Corey*, 43 Pa. St. 495.

<sup>2</sup> *People v. Carman*, 47 Hun. 380.

<sup>3</sup> *McDonald v. Payne*, 114 Ind. 359.

<sup>4</sup> *Rutherford v. Davis*, 95 Ind. 245.

<sup>5</sup> *Ruston v. Grimwood*, 30 Ind. 364;  
*Suits v. Murdock*, 63 Ind. 73; *Rutherford v. Davis*, 95 Ind. 245.

no jurisdiction will not protect the officer.<sup>1</sup> It is, however, to be kept in mind that if the court has jurisdiction over the general subject and that jurisdiction is invoked in the particular instance in some appropriate method, the judgment will protect the officer who executes it although the tribunal may have erred in deciding that it did have jurisdiction, since, if the tribunal has authority over the parties and over the general subject, that is, if it has authority to proceed at all, its judgment, although erroneous, will not be void.

A common mode of reviewing the proceedings in highway cases in many jurisdictions is by *certiorari*. The writ of *certiorari* will issue to inferior tribunals possessing functions of a judicial nature, and its office is to bring into the superior court which issues the writ the entire record made by the inferior tribunal to which it is directed.<sup>2</sup> Where an appeal is provided for by statute *certiorari* will not, as a general rule, be awarded,<sup>3</sup> but upon this point there is some conflict of opinion.<sup>4</sup> The better opinion, as we believe, is that where a full remedy is given by appeal *certiorari* will not lie, since all, and, indeed, more than all that can be accomplished by *certiorari*, may be secured by an appeal, and the multiplication of remedies simply creates confusion without any resulting benefit to any one. The whole subject of the seizure of property for highways is so much of statutory origin that it would seem better to look only to the statute for the direct remedy. In those States where it is held that, by appealing, all questions as to the jurisdiction of the person are waived, there is reason for holding that *certiorari* will lie,<sup>5</sup> but we can not conceive why a question of jurisdiction, seasonably and appropriately made, should be waived by an appeal from a judg-

<sup>1</sup>Cottingham v. Fortville, etc., Co., 112 Ind. 522.

<sup>2</sup>People v. Betts, 55 N. Y. 600; Farmington, etc., Co. v. The Commissioners, 112 Mass. 206; Bacons Abr., title *Certiorari*; Tidd's Pr. 397; 3 Am. & Eng. Ency 60.

<sup>3</sup>Cedar Rapids, etc., Co. v. Whelan, 64 Ia. 694; Dunlap v. Toledo, etc., Co., 46 Mich. 190; Moore v. Baily, 8 Mo.

App. 156; People v. Wallace, 4 N. Y. Supt. Ct. 438; Boston, etc., Co. v. Folsom, 46 N. H. 64.

<sup>4</sup>Com'rs v. Harper, 38 Ill. 104; People v. Brighton, 20 Mich. 57, Shields v. Justices, 2 Cold. 60; Roberts v. Williams, 13 Ark. 355.

<sup>5</sup>Com. v. Town, 19 Ill. App. 259; Names v. Commissioners, 30 Mich. 490; Bixby v. Goss, 54 Mich. 551.

ment in condemnation cases any more than in ordinary civil actions.<sup>1</sup>

There is much conflict among the cases as to what can be accomplished by *certiorari*, and it is by no means easy to extract a satisfactory conclusion from them. By some of the courts it is held that the question of damages must be tried on appeal and can not be tried on *certiorari*.<sup>2</sup> Other courts hold that the revisory court can do no more than consider the question of the jurisdiction of the inferior tribunal.<sup>3</sup> There are other courts which hold that all errors of law may be reviewed.<sup>4</sup> In other cases the holding seems to be, that where there is no remedy by appeal all questions may be reviewed, but where there is such a remedy the only question that will be considered is that of jurisdiction.<sup>5</sup> It is generally agreed that *certiorari* lies only to correct errors of law, and not to review the evidence,<sup>6</sup> but even here there is diversity of opinion, for some of the cases hold that the court may inquire on *certiorari* whether there was any evidence of a fact,<sup>7</sup> and this inquiry, it is obvious, can not be made without a review of the evidence. The truth is that the office of a *certiorari* has been so much enlarged by the desire to make it fit particular cases, by some of the courts, that it has lost its original character, and has become the offspring of a usurped power, for the courts which have so enlarged the office of the writ have supplanted legislation by a creature of their own.

The writ of *certiorari* was not, at common law, a writ of right; it is only by statute that it becomes so.<sup>8</sup> The party who seeks

<sup>1</sup> Certainly jurisdiction of the subject-matter can not be waived, and without seasonable objection, as the better reasoned cases declare, objections to jurisdiction of the person are waived.

<sup>2</sup> *State v. Hulick*, 33 N. J. L. 307; *Johnson v. Rankin*, 70 N. C. 550.

<sup>3</sup> *Ex parte Nightingale*, 11 Pick. 688; *Richardson v. Smith*, 59 N. H. 517.

<sup>4</sup> *McAllilley v. Horton*, 75 Ala. 491; *Donahue v. Will Co.*, 100 Ill. 94; *Hyslop v. Finch*, 99 Ill. 571; *State v. Dodge Co.*, 56 Wis. 79.

<sup>5</sup> *People v. Betts*, 55 N. Y. 600; *People v. Com'rs*, 30 N. Y. 72.

<sup>6</sup> *Betts v. Warren*, 5 Harr. (Del.), 4;

*Corrie v. Corrie*, 42 Mich. 509; *Rayner v. The State*, 52 Md. 368; *De Rochemburne v. Com.*, 12 Minn. 78; *Lapan v. Com.*, 65 Me. 160; *State v. Davis*, 48 N. J. L. 112; *People v. Assessors*, 39 N. Y. 81; *Healy v. Kneeland*, 48 Wis. 497; *Poe v. Machine Works*, 24 W. Va. 517.

<sup>7</sup> *Jackson v. People*, 9 Mich. 111; *Ex parte Turnpike Co.*, 62 Ala. 93; *Camden v. Bloch*, 65 Ala. 236; *People v. Police Board*, 72 N. Y. 415; *Moreland v. Whitford*, 54 Wis. 150.

<sup>8</sup> *Ex parte Hitz*, 111 U. S. 766. Perhaps it should be said that in some jurisdictions it has become a writ of right by a species of judicial legislation.

a review of the proceedings by *certiorari* must show, in his petition, that substantial justice requires that the writ should be awarded; it is not enough to show mere immaterial errors or irregularities in the proceedings which do not affect the merits of the controversy.<sup>1</sup> Where the error alleged relates to a matter of policy or expediency, the writ will be denied, for such matters are committed to the discretion of the inferior tribunal.<sup>2</sup> If there is unreasonable delay in applying for the writ the application will be denied; especially is this so where work has been done and money expended in opening the way.<sup>3</sup>

The proper mode of securing a *certiorari* is by a written petition setting forth generally the nature of the proceeding of which a review is sought, and specifically alleging the errors which are asserted to invalidate the proceedings.<sup>4</sup> It is necessary that the alleged errors be specifically assigned, and, as a general rule, it is only such assignments as are reasonably certain and specific that the courts will regard. A clear *prima facie* case must be shown by the party who applies for the writ,<sup>5</sup> and to do this the petitioner must show, among other things, that he has such a special interest as entitles him to assail the proceedings sought to be reviewed.<sup>6</sup> He must also show that there has been a final judgment.<sup>7</sup>

The effect of granting a *certiorari* is to stay proceedings, except in cases where the work of opening the highway has been commenced,<sup>8</sup> and, as we suppose, it would operate as a stay even in such cases if it has been promptly applied for, since a party who proceeds with diligence loses no rights with which the law invests him. Unless a different judgment is authorized

<sup>1</sup> *Charlestown v. Commissioners*, 109 Mass. 270; *Petition of Landaff*, 34 N. H. 163.

<sup>2</sup> *Tiedt v. Carstensen*, 61 Iowa, 334.

<sup>3</sup> *Noyes v. City*, 116 Mass. 87; *Keys v. Marin Co.*, 42 Cal. 252; *Bresler v. Ellis*, 46 Mich. 335; *State v. Ten Eyck*, 18 N. J. L. 373; *Hancock v. Boston*, 1 Metc. 122.

<sup>4</sup> *Chambers v. Lewis*, 9 Iowa, 533; *Board v. Magoon*, 109 Ill. 142.

<sup>5</sup> *Lees v. Childs*, 17 Mass. 351; *Willis v. Dunn*, *Wright* (Ohio), 130.

<sup>6</sup> *Parnell v. Commissioners*, 34 Ala. 278; *Vandertolph v. Highway Com.*, 50 Mich. 330.

<sup>7</sup> *People v. County*, 40 Cal. 479; *Palms v. Campau*, 11 Mich. 109; *Stokes v. Early*, 45 N. J. L. 478; *Richardson v. Smith*, 59 N. H. 517.

<sup>8</sup> *John v. State*, 1 Ala. 95; *Hyslop v. Finch*, 99 Ill. 171, *State v. Lambertville*, 46 N. J. L. 59.

by statute, the final judgment must be one either quashing or affirming the proceedings in whole or in part, for, in the absence of a statute, the court into which the cause is carried by *certiorari* has no authority to pronounce judgment upon the merits of the controversy.<sup>1</sup>

It is hardly necessary to add that the general rule is that appeals lie only from final judgments, and that it is only in cases where there is such a judgment that a *certiorari* will be awarded. Where there is no statutory provision to the contrary, a case can not be reviewed piecemeal, but must be brought to the revisory court as an entirety.<sup>2</sup>

<sup>1</sup> *McAllilley v. Horton*, 75 Ala. 491; *Commissioners*, 6 Allen, 131; *Thompson v. Brooks*, 29 Ark. 173; *Basnett v. Jacksonville*, 18 Fla. 523; *Hamilton v. Harwood*, 113 Ill. 154; *Wooton v. Manning*, 11 Texas, 327; *Peacock v. Leonard*, 8 Nev. 157; *Commonwealth v. West Boston*, 13 Pick. 195; *Lowell v. Commissioners*, 6 Allen, 131; *Thompson v. School District*, 25 Mich. 483.

<sup>2</sup> *Western Union Tel. Co. v. Locke*, 107 Ind. 9; *Freshour v. Logansport*, etc., 104 Ind. 463; *Freeman on Judgments*, sections 33, 36.

## CHAPTER XVII.

### LOCATING AND OPENING PUBLIC WAYS FOR TRAVEL.

Public roads should be so laid out that the public and all persons whose interests are affected may know their boundaries and limits. Where the road is created by express dedication then, as we have seen, its boundaries are determined from the act of dedication. Where the right of the public is acquired by user, then, as we have elsewhere shown, the boundaries of the road are generally ascertained by reference to the user.<sup>1</sup> Where the public road is established by legal proceedings under the right of eminent domain, then, its boundaries should, in strictness, be such as conform to the petition and order. If the law prescribes the width of the public way, then, of course, the way must, in width, conform to the requirements of the law. The authority to determine what shall be the width of a road or street is frequently delegated to the highway officers, and in such cases it is for them, in the fair exercise of their discretion, to determine what its width shall be. In the absence of fraud or oppression, their judgment is conclusive.<sup>2</sup> If, however, they transcend their authority or act wantonly or oppressively, the courts will interfere to prevent injustice.

In many of the States the statutes prohibit the opening of highways through gardens, vineyards, and the like, and these statutes are to be regarded as mandatory. Their effect is to prohibit the highway officers from opening the highway on forbidden grounds.<sup>3</sup> The authority of the highway officers is a statutory one and they have no right to take property which

<sup>1</sup> *Mt. Olive Tp. v. Hunt*, 51 N. J. L. 274, S. C. 17 Atl. R. 291; *Ehret v. Kansas City, etc., R. R. Co.*, 20 Mo. App. 251, *ante*, p. 136.

<sup>2</sup> *Humboldt v. Dinsmore*, 75 Cal. 604, S. C. 17 Pac. R. 710.

<sup>3</sup> *People v. The Judges of Dutchess*, 23 Wend. 360; *Snyder v. Plass*, 28 N. Y. 465; *Snyder v. Trumbour*, 38 N. Y. 355; *Clark v. Phelps*, 4 Cow. 202.



the law protects from appropriation.<sup>1</sup> It is within the legislative power to subject all property to seizure when required for a public road or street, but it is also within the power of the legislature to exempt a class of property from seizure. Doubtless an act making a discrimination which would have the effect to invest one class with special privileges to the exclusion of other classes would, in most of the States,<sup>2</sup> be held invalid, but an act which exempted property of a designated kind, no matter by what class it is owned, would be valid, since such an act could not be justly said to confer special privileges upon a favored class. The legislature must, reasoning from settled principles and analogous cases, have the power to determine what class of property the public necessity demands for use as highways, and to declare that such necessity will not justify the appropriation of a designated kind of property. Where the statute makes no express exemption, then any and all property may be seized, except property that has already been appropriated to a public use, but, as to the latter class of property, the law, as we have seen, is, that it is exempt, unless the statute, by express provision or clear implication, authorizes a second seizure and an appropriation to a new public use. Where the new way is laid out, in whole or in part, over an existing public way, neither the public nor the property owners can successfully complain, for, in such a case, there is, in fact, no second seizure nor any new use.<sup>3</sup> Whether the old way shall form part of the new is a matter to be determined by the highway officers to whom the authority to lay out roads or streets is delegated.

Where a party claims that his property is exempt from seizure for a road or street it is incumbent upon him to show that it is of the class exempted by the statute. Thus, where the statute provides that a highway shall not be laid out across any

<sup>1</sup> *Ex parte* Clapper, 3 Hill, 458; Harrington v. People, 6 Barb. 612; Clark v. Phelps, 4 Cow. 202; Miller v. Brown, 56 N. Y. 383; Bass v. City of Fort Wayne (Ind.), 23 N. E. R. 259.

<sup>2</sup> Acts authorizing the establishment of highways must, in many jurisdictions, be general. *State v. Hudson*, 50 N. J. L. 82.

<sup>3</sup> *People v. Commissioners of Milton*, 37 N. Y. 360; *Wabaunsee Co. v. Bisby*, 37 Kan. 253, S. C. 15 Pac. R. 241; *Wells v. Co. Commissioners*, 79 Me. 522, S. C. 11 Atl. R. 417.

fixture or erection for a manufacturing establishment, it will not defeat the rights of the local authorities to cross a mill-race which furnishes the water power for the owner's mill.<sup>1</sup> But where a fixture is necessarily a part of the mill and the highway would impair or destroy its use, the highway officers have no authority to destroy it by laying out a public way in cases where they assume to proceed under a statute prohibiting the interference with the fixtures of a manufacturing establishment.<sup>2</sup> If a rural highway is laid out through an orchard or a garden, where the statute forbids the opening of highways through such places, the officers who enter and attempt to open a way will, as the decided cases adjudge, be liable as trespassers and can not justify under the order.<sup>3</sup> We have stated the rule as it is laid down by the decided cases, but we can not pass the question without expressing a doubt as to their soundness. It seems to us where there is a petition,<sup>4</sup> notice, and the property owner has "his day in court" in due course of law, that the judgment of the appropriate tribunal upon the question of the right to locate the road is conclusive until overthrown by a direct attack and will justify the officer who undertakes its execution. We can not avoid the conclusion that the question as to the right to locate the road upon the line proposed is directly involved and that as the property owners have an opportunity to litigate that question (indeed, are directly challenged to do so), the judgment estops them from afterwards assailing the order locating the highway in a collateral attack.<sup>5</sup> There is in such a case jurisdiction over the general subject, and the error is not in assuming jurisdiction over the general subject-matter, but in determining that the road shall run through a particular place. At most there is no more than an error of judgment, and that extends no further than the erroneous adjudication that a particular place

<sup>1</sup> *People v. Kingman*, 24 N. Y. 559; *Lansing v. Caswell*, 4 Paige, 523.

<sup>2</sup> *Clark v. Phelps*, 4 Cowen, 190.

<sup>3</sup> *Harrington v. People*, 6 Barb. 612; *People v. Commissioners of Greenburg*, 57 N. Y. 549; *People v. Horton*, 8 Hun. 357. In the two cases last cited the term "garden" is defined.

<sup>4</sup> In a very forcible opinion it is held that an order laying out a highway is conclusive as against a collateral attack, although it departs from the line described in the petition. *Davenport v. Mutual Savings Assn.*, 15 Ia. 213.

<sup>5</sup> *Humboldt Co. v. Dinsmore*, 75 Cal. 604, S. C. 17 Pac. R. 710.

may be lawfully occupied as a highway. We do not dispute the general doctrine that where there is no jurisdiction the ministerial officer who attempts to execute the judgment is a trespasser;<sup>1</sup> what we assert is that where there is jurisdiction over the general subject and nothing more than an erroneous adjudication is made against a party in court under due process of law, the general rule referred to has no relevancy.<sup>2</sup> If the proceedings were purely *ex parte*, or if there were no opportunity to litigate the question in due course of law, it would be entirely different. It is to be noted that the question whether a part of the way shall or shall not cross designated property, is one affecting only that property and its owner, for it does not affect the right to proceed with the matter generally.

It is held almost everywhere that a property owner can not avail himself on appeal of objections, except such as go to the jurisdiction, not presented to the tribunal of original jurisdiction. In accordance with this general rule it is held that if he should object only to the amount awarded as damages he would be estopped from objecting in a collateral proceeding that the highway officers had no authority to occupy the particular place for highway purposes, and this could not be true if the proceedings were absolutely void.<sup>3</sup> If he should accept the damages awarded we suppose it very clear that he could not subsequently assert that the particular land was not subject to seizure, for the acceptance of damages would unquestionably estop him, unless, indeed, he could show fraud or mistake.<sup>4</sup> There are many other modes in which an estoppel may be created. It may arise out of the voluntary release of the damages awarded.<sup>5</sup>

<sup>1</sup> Franklin County v. Brooks, 68 Tex. 679, S. C. 5 S. W. Rep. 819; Erwin v. Fulk, 94 Ind. 235.

<sup>2</sup> Goodwillie v. Lake View (Ill.), 21 N. E. R. 817; Huntington Co. v. Knauffman, 17 Atl. R. 595.

<sup>3</sup> Cummins v. Shields, 34 Ind. 154; St. Joseph, etc., Co. v. Cincinnati, Wabash, etc., R. R. Co., 109 Ind. 172; Ogden v. Stokes, 25 Kan. 517; Dyckman v. New York, 5 N. Y. 434.

<sup>4</sup> State v. Langer, 29 Wis. 68; Whittlesey v. Hartford, etc., Co., 23 Conn.

421; Hitchcock v. Danbury, etc., Co., 25 Conn. 516; Town v. Blackberry, 29 Ill. 137; St. Louis, etc., Co. v. Karnes, 101 Ill. 402; Logan v. Vernon, etc., Co., 90 Ind. 552; Marling v. Burlington, etc., Co., 67 Ia. 331; Hatch v. Hawkes, 126 Mass. 177; Chatterton v. Parrott, 46 Mich. 432; Hunter v. Jones, 13 Minn. 307; Felch v. Gilman, 22 Vt. 38.  
<sup>5</sup> Trickey v. Schlader, 52 Ill. 78; Gurnsey v. Edwards, 26 N. H. 224; Freeman v. Weeks, 45 Mich. 335.

It may be created by the voluntary act of the owner, as, for instance, moving his fences so as to open the way for travel on the line laid out,<sup>1</sup> or by expressly naming or recognizing the road in a deed.<sup>2</sup> An owner may, indeed, be estopped by allowing the highway officers to open and improve the way at the public expense and not making seasonable objection.<sup>3</sup> We think that these authorities make it safe to conclude that where the controversy is whether a particular parcel of property forming part of the line of a proposed road may be seized, the judgment of the tribunal is not void if rendered in a case where the owner has had his "day in court" in accordance with the law, although it may be voidable in a direct attack.

If the property is such as may be occupied for highway purposes at the time the owner receives notice, he can not defeat the right of the public to appropriate the property by changing its condition. Thus, where the statute forbids the opening of a road through ground occupied by a building the owner can not defeat the proceedings by erecting a building after he has received notice.<sup>4</sup> The question for the decision of the tribunal is whether the land was such at the time the legal notice was given its owner as authorized its occupancy for a highway, and no act done subsequent to the service of the notice can impair the right of the public. As this question is one which the tribunal of original jurisdiction must decide, it would seem that its decision is conclusive as against collateral attacks.<sup>5</sup>

We have said, in a general way, that the road must be of the width prescribed by statute, but it is necessary to treat this subject more particularly since it is one of considerable importance. It is essential that the road should be of the width prescribed,<sup>6</sup>

<sup>1</sup> *State v. Wertzel*, 62 Wis. 184; *City of Logansport v. Uhl*, 99 Ind. 531, 50 Am. R. 109.  
<sup>2</sup> *Schatz v. Pfeil*, 56 Wis. 429; *Hunter v. Jones*, 13 Minn. 307; *Hartshorn v. Potroff*, 89 Ill. 509; *Rees v. Chicago*, 38 Ill. 322.

<sup>3</sup> *Moses v. St. Louis, etc., Co.*, 84 Mo. 242; *Eureka v. Croghan* (Cal.), 19 Pac. R. 485.

<sup>4</sup> *McClelland v. Miller*, 28 Ohio St. 488; *Pittsburgh v. Scott*, 1 Pa. St. 309; *Rettinger v. Passaic*, 45 N. J. L. 146;

<sup>5</sup> *Carris v. Commissioners of Water-  
loo*, 2 Hill, 443.

<sup>6</sup> *Cyr v. Dufour*, 62 Me. 20.

<sup>6</sup> *In re Lackawanna Road*, 112 Pa. St. 212; *Erwin v. Fulk*, 94 Ind. 235; *White v. Conover*, 5 Blackf. 462; *Barnard v. Haworth*, 9 Ind. 103; *Carlton v. State*, 8 Blackf. 208; *State v. Wagner*, 45 Ia. 482. It is held in a strongly rea-

but, unless timely objection is made, user may obviate the objection that the road does not in this respect conform to the requirements of the statute. Although the statute is not complied with as to the width in laying out the road, still, if there is a user for a considerable period of time, the road will be deemed a public one, rightfully open to the use of the public.<sup>1</sup> The presumption, in the absence of countervailing facts, is that the highway officers have obeyed the law and have laid out a road of the required width. Thus, under a statute conferring authority to lay out two classes of roads, one class two rods in width, and the other three rods in width, it was held that where the road opened was two rods in width it should be assumed that the highway officers intended to lay out and did lay out a road of the class first named, although there was no express order or declaration in the record to that effect.<sup>2</sup>

The public way must be surveyed, opened and worked on the line described in the application and order in all cases where its existence is asserted solely upon an order of a board of commissioners or other like tribunal.<sup>3</sup> An unimportant deviation from the line described in the petition or order will not, as a general rule, be fatal to the existence of the highway.<sup>4</sup> A substantial compliance will, in most cases, be sufficient. There may be cases, especially with respect to urban streets, where

soned opinion that the failure to make the way of the prescribed width does not render the proceedings void, and that they can not be impeached in a collateral proceeding. *Knowles v. Muscatine*, 20 Ia. 248; *Mallory v. Montgomery*, 48 Ia. 681; *S. P. Davenport v. Mutual Savings Ass'n*, 15 Ia. 213. We incline to concur in the doctrine of these cases.

<sup>1</sup> *Highway Comm. v. Harrison*, 108 Ill. 398.

<sup>2</sup> *French v. Barre*, 58 Vt. 567.

<sup>3</sup> *Halverson v. Bell* (Minn.), 39 N. W. R. 324; *Deere v. Cole*, 118 Ill. 165; *Ackerson v. Van Vleck*, 72 Ia. 57, S. C. 35 N. W. Rep. 332; *Phipps v. State*, 7 Blackf. 513; *Crossley v. O'Brien*, 24 Ind. 325. We here speak of both the

final order and the application, and not of cases, where the final order departs from the petition and the road is opened in accordance with the order, but it may be said that the weight of authority is that the order must conform to the petition.

<sup>4</sup> *Packard v. Androscoggin Co. (Me.)*, 12 Atl. Rep. 788; *Carr v. Berkley*, 145 Mass. 539; *Gilkey v. Watertown*, 141 Mass. 317; *State v. Rapp* (Minn.), 38 N. W. R. 926. *Contra*, *People v. Whitney Point*, 102 N. Y. 81. Where a road of designated class is established it can not be changed to a road of a different class without additional compensation. *Wooldridge v. Eastland County*, 70 Tex. 680, S. C. 8 S. W. R. 503.

the line must be strictly adhered to, for it is apparent that a deviation of a few inches might cause serious mischief, but in the case of a rural highway a deviation of a few inches, or of even a few feet, could seldom work injury to either the public or the property owner, still there may be cases where no deviation should be permitted in opening suburban roads. Particular cases may often call for special rules. Mistakes in ordering the line to be opened may be corrected within a reasonable time, provided no intervening rights have been acquired which would be prejudiced by opening the road.<sup>1</sup>

Where the statute requires that the road shall be located and opened for travel within a limited time the failure to open it within the time designated may, it has been held, operate to destroy the right of the public to have the way thrown open for travel.<sup>1</sup> But slight circumstances will preserve the right of the public,<sup>2</sup> and, as we think, the right ought not to be lost through the negligent delay of the officers, unless it has caused special injury to some property owner. It is true, as a general rule, that the rights of the public are not lost by the negligent omission of its officers which harms no one and that rule should apply to cases of delay in opening highways.<sup>3</sup>

Where a new road is established over an old one the failure to formally open it under the order of the highway tribunal does not take away the rights of the public.<sup>4</sup> If the public actually use the way for passage the failure of the officers to survey and locate it under the order will not affect their right to use it as a public road.<sup>5</sup> We regard the doctrine just stated

<sup>1</sup> *Marble v. Whitney*, 28 N. Y. 297; *Walker v. Caywood*, 31 N. Y. 51; *Beckwith v. Whalen*, 65 N. Y. 322.

<sup>2</sup> *Brown v. Robertson*, 123 Ill. 631.

<sup>3</sup> *Humphreys v. Woodstown*, 48 N. J. L. 588, S. C. 7 Atl. R. 301. In the proper case a defective order may be aided by a map or diagram. *Satterly v. Winne*, 101 N. Y. 218. A highway marked out on plan not lost by delay unless it is very great. *Badgley v. Bender*, 4 Canada, K. B. (O. S.) 221.

<sup>4</sup> *Heald v. Moore*, 79 Me. 271, S. C. 9 Atl. R. 734.

<sup>5</sup> *Wilson v. Janes*, 29 Kan. 233. Where the report of the surveyor by whom a road was laid out was dated in 1843, but was not delivered until 1846, when it was recorded without order of court, and in the spring of 1844 a road was opened and used which corresponded with that described in the report, it was held that the legality of the highway depended on the dedication. *State v. Stillwell*, 50 N. J. L. 530, S. C. 14 Atl. R. 563. We regard the conclusion as correct, but think the highway exists by prescription rather than dedication.

as one of wide application, and we think that if proceedings are had for establishing a road, and the public use the road substantially as it is described in the proceedings for a considerable period of time without objection from the property owners, it should be adjudged that the interested parties have given construction and effect to the proceedings by their acts. Such cases are closely analogous to cases where parties give force and construction to incomplete or ambiguous instruments by acts done under them, and there is no valid reason why the familiar rule which prevails in such cases should not be applied in highway cases where parties expressly or impliedly acquiesce in and give construction to proceedings establishing a road or street. If an objection is seasonably made, and made in an appropriate way, then, of course, the doctrine stated can not govern.

Natural causes or legal proceedings may prevent the opening and preparing of the way for travel within the time limited, and when the delay is thus caused the public right can not be justly regarded as at an end. Causes which the highway officers can not control by reasonable care and diligence ought not to be permitted to so operate as to destroy the public right.<sup>1</sup> The deprivation of the right is really in the nature of a forfeiture, and courts should deal liberally with the public.

Where there is an order declaring that a highway shall be opened and worked within a limited time, it is sufficient, as a general rule, that the proper officers do some work upon the way indicating an acceptance, and it is not necessary that the way should be fully improved within the time limited.<sup>2</sup> If the order is mandatory in its terms, and the duty of the officers to proceed to open and survey the road is imperative, mandate will lie to compel the performance of such a duty either at the suit of the proper public officer or at the suit of a citizen who has a special interest in the road.<sup>3</sup> If the duty is discretionary

<sup>1</sup> *Wilson v. Jones*, 29 Kan. 233.

<sup>2</sup> *Wilcox v. New Bedford*, 140 Mass. 570.

<sup>3</sup> We are speaking of cases where an order has been made directing the opening of the way, for a citizen can not,

in the absence of a statute, compel highway officers to order the establishment of a highway. Where there is needless or unreasonable delay in opening a road or street that has been finally established mandamus will lie. *Mc-*

mandate will not lie in any event, and it can not be sued out by an individual who has a mere general interest in having the way opened and worked.

If the location of the way is indefinite and uncertain, but there has been a user of a way answering in a general manner to the line described, the user will determine the limits and boundaries of the road.<sup>1</sup> The line opened by the highway officers, and used by the public without objection from the property owners, may be regarded as the road established, although it may deviate from the line described in the order.<sup>2</sup> If public user has located a way under color of an order laying it out, the fact that the highway officers charged with the duty of surveying it and of preparing it for the public use fail to discharge their duty will not destroy the character of the way as a public road.<sup>3</sup> In affirming this we are not unmindful of the rule that a way does not become a road or street without acceptance by the proper local authorities, but, on the contrary, we have fully kept that rule in mind; nevertheless, we are clear that the previous order takes the place of a subsequent acceptance, and, in all material respects, operates as such an acceptance. It may be true that, if there was such a plain and wide departure from the order as to rebut the inference that the user was under color of the order and authorized by it, a different rule would prevail, but if the user is substantially of the line described in the order it would create a public way.

A road established by user, although on a line entirely different from that described in the order can not, after the lapse of a long period of time, be changed except by proceedings in accordance with the statute.<sup>4</sup> Where the rights of the public and

*Laughlin v. Municipality*, 5 La. Ann. 504; *Graff v. Baltimore*, 10 Md. 544; *Whiting v. Boston*, 106 Mass. 89.

<sup>1</sup> *State v. Vanderveer*, 47 N. J. L. 259; *Ehret v. Kansas City, etc.*, R. R., 20 Mo. App. 251.

<sup>2</sup> *Glenn v. Com. (Pa.)*, 5 Cent. R. 402; *Savannah v. Hancock (Mo.)*, 8 West. R. 248.

<sup>3</sup> *Brown v. Kansas City, etc.*, 20 Mo.

App. 427; *Hart v. Red Cedar*, 63 Wis. 634.

<sup>4</sup> *Lemasters et al. v. State*, 10 Ind. 391; *Regina v. Hunt*, 17 Canada C. P. 443; *Pearce v. Gilmer*, 54 Ill. 25. See *Patton v. State*, 50 Ark. 53, S. C. 6 S. W. R. 227; *Missouri Pacific R. R. Co. v. Lee*, 70 Texas, 496, S. C. 7 S. W. R. 857; *Langdon v. State*, 23 Neb. 509, S. C. 37 N. W. R. 79; *McNair v. State (Neb.)*, 41 N. W. 1099.



of the property owners are fixed by user for a sufficient length of time or by dedication and acceptance, the way can not be changed except in the manner provided by law.<sup>1</sup>

In some of the States the statutes provide that roads may be opened through private property if the owners consent, and the question has arisen whether the consent evidenced by a parol statement or agreement is sufficient. The rule sanctioned by the decided cases is that a verbal consent is all that is required.<sup>2</sup> It is somewhat difficult to reconcile this doctrine with the rules that an easement is an interest in land and that a way constitutes an incumbrance,<sup>3</sup> but possibly it may be done on the ground that a parol dedication is valid. If the consent is acted upon and the highway officers expend money in improving the road, or individuals acquire rights on the faith that the road legally exists, then, there can be no doubt that the property owner ought to be estopped from denying the validity of the proceedings founded on his consent.

Many of the statutes provide that where the opening of a highway to travel will require the removal of fences before the ministerial officers attempt to enforce the order a specified notice must be given the owner whose fences must be removed, and where there are such statutory provisions it is the duty of such officers to give the required notice.<sup>4</sup> The failure to give the notice will not invalidate the order establishing the road, but the officer who undertakes to open the road without giving the notice required will be a trespasser *ab initio*, since he will be regarded as having abused the authority conferred upon him by the law.<sup>5</sup> It is essential to the protection of the ministerial officer that the line of the road be laid out with reasonable certainty, for his authority to open a highway for travel is limited to that described, and if he attempts to open one not described

<sup>1</sup> Mallock v. Anderson, 4 Canada, Q. B. 481; Regina v. Hunt, *supra*. The owner can not withdraw his dedication or consent. Marratt v. Deihl, 37 Iowa, 250.

<sup>2</sup> People v. Goodwin, 5 N. Y. 568;

People v. Albright, 23 How. Pr. R. 306.

<sup>3</sup> Browne on Statute of Frauds (4th ed.), section 232.

<sup>4</sup> Kelly v. Horton, 2 Cowen, 424.

<sup>5</sup> Rutherford v. Davis, 95 Ind. 245;

Ruston v. Grimwood, 30 Ind. 364.

with reasonable certainty he will be held liable as a trespasser.<sup>1</sup> The officer will be protected if the way is described so that it can be located on the correct line by a competent surveyor and there is jurisdiction to make the order, although the proceedings may not be regular.<sup>2</sup> In opening a road or in taking materials under an order made by the proper officers, it is the duty of the ministerial officer to use ordinary care to prevent injury to private property.<sup>3</sup> Where an award of damages leaves in the owner the option of removing buildings, he may waive the right, and if he does waive it, he can not treat the officer as a trespasser, who, acting under authority of the order, does remove them.<sup>4</sup>

Where the statute definitely and imperatively fixes the width of a road, a line surveyed and described as the center line of the road or street will give its dimensions with sufficient accuracy to justify the ministerial officers in opening and preparing it for travel. The reason for this rule is apparent, for if the width is definitely and decisively fixed by law and the center line is accurately given, there can be no difficulty in laying out a road of the proper width.<sup>5</sup>

The courts hold with considerable strictness that the statutory requirements in regard to recording the order, or filing it with the designated officer, must be complied with, and some of the cases go so far as to hold that a failure to comply with the statute in this respect will prevent the opening of the way to travel.<sup>6</sup> We think that unless the statute makes the filing or recording of the order within a specified time a condition precedent to

<sup>1</sup> *Guptail v. Teft*, 16 Ill. 365; *Beckwith v. Beckwith*, 22 Ohio St. 180; *Beyer v. Tanner*, 29 Ill. 135; *Barnard v. Haworth*, 9 Ind. 103; *Beardsley v. French*, 7 Conn. 125. This rule does not apply to acts done within the limits of a highway established by user. *Miller v. Silsby*, 8 N. H. 474.

<sup>2</sup> *Yeager v. Carpenter*, 8 Leigh. 454.

<sup>3</sup> *Dovaston v. Payne*, 2 H. Blk. 527; *Stackpole v. Healy*, 16 Mass. 33; *Cool v. Crommet*, 13 Me. 250; *Wright v. Phillips*, 36 Me. 551; *Campbell v. Kennedy*, 34 Ia. 494.

<sup>4</sup> *Gay v. Bradstreet*, 49 Me. 580; *Mursey v. Cummings*, 34 Me. 74.

<sup>5</sup> *Tucker v. Rankin*, 15 Barb. 471; *Van Bergen v. Bradley*, 36 N. Y. 316; *People v. Commissioners of Red Hook*, 13 Wend. 310; *Herrick v. Stover*, 5 Wend. 581; *Lawton v. Commissioners*, 2 Caines, 179; *People v. Commissioners of Salem*, 1 Cowen, 23.

<sup>6</sup> *Prescott v. Beyer*, 34 Minn. 493; *Dolphin v. Pedly*, 27 Wis. 469; *Commissioners of Lawndale v. Barry*, 66 Ill. 496; *Cole v. Kern*, 6 Thomp. (N. Y.) 480.

the right to open the way, and contains negative restraining words, the officers may, by subsequently filing or recording the order, proceed to open and prepare the way for travel.<sup>1</sup> The order is the authority and the recording or filing is merely for the purpose of imparting notice, and we can see no valid reason why the failure to record or file the order within the time designated should be held to overthrow or render nugatory the judgment. Of course there must be some record, and where the tribunal is a temporary one and has no record, then the filing or recording of the order with some officer who has custody of public records is indispensably necessary.

Where there has been long continued user it is not necessary in order to entitle the party claiming that a public road exists to first prove that there is no record in order to entitle him to introduce parol evidence.<sup>2</sup> It is held that the right of the public is an easement and that its character as a public easement may be proved by reputation.<sup>3</sup> Where an order is made and filed but subsequently lost, its loss will not defeat the rights of the public in the way laid out.<sup>4</sup> It is held that the record of the order and proceedings will not be sufficient to prove the establishment of the way unless it appears that there was jurisdiction.<sup>5</sup> This doctrine can not be accepted without some qualification, for, if the court making the order is one of general jurisdiction, the presumption will be in favor of its jurisdiction if the record is silent, nor do we think it can apply where officers assuming to act under the order have thrown open the way and the public have used it without objection from the owners of the fee.

Where the question as to the right to use a road is made by one prosecuted for obstructing the way and who is not an adjoining or adjacent land owner, it is enough to prove that there was jurisdiction of the general subject and that there is an order in due form, for such a person ought not to be allowed, in a collateral mode, to present objections grounded upon irregular-

<sup>1</sup> *Frame v. Boyd*, 35 N. J. L. 457.  
The description required to be recorded may be made sufficiently certain and definite by the aid of a map. *Kansas City, etc., Co. v. Story*, 96 Mo. 611, S. C. 10 S. W. 203.

<sup>2</sup> *Mosser v. Vincent*, 34 Ia. 478.

<sup>3</sup> *Hampson v. Taylor* (R. I.), 3 New Eng. R. 640.

<sup>4</sup> *State v. O'Laughlin*, 29 Kan. 20.

<sup>5</sup> *McBurney v. Graves*, 66 Ia. 314.

ities in the proceedings.<sup>1</sup> If such a person can show that the proceedings were taken without authority,<sup>2</sup> then he may defeat a prosecution or an action, but we can not conceive how, on principle, he can be allowed to prevail in a collateral attack where there was not an entire want of jurisdiction. Nor can any one, whose special rights as a landholder have not been invaded, collaterally question the validity of the proceedings where there has been user by the public and no objection is made by the land owners, for it is quite clear that such a person would have no right to treat the officers who opened the way under color of the proceedings as mere trespassers.<sup>3</sup> If the land owners do not see proper to object, the officers may, as against one who has no other right than that of a traveler, proceed to open and use the way ordered to be established, although the proceedings may be so defective as to fall before a direct attack made by one who has a special interest in the matter. There is a palpable difference in principle between a case in which the land owner resists the opening and use of the way, and a case wherein the only interest of the party resisting the right to open and maintain the way is that included in the general privilege common to all citizens of passing and re-passing, and the distinction should be observed in practice.<sup>4</sup> Where there is color of authority to open the road, and no objection is interposed by those having a special interest, the natural presumption is that the land owners have acquiesced in the proceedings, and this presumption ought to stand, at least, as a *prima facie* case. If it does so stand, then the officers who execute the order can not be held to be trespassers.

The principle established by the decisions in analogous cases justifies the conclusion that where the opening of the road or

<sup>1</sup>State v. Robinson, 28 Iowa, 514; Campbell v. Kennedy, 34 Iowa, 494. In Marvin v. Pardee, 64 Barb. 353, a different doctrine seems to be laid down, but we regard the decision in that case as erroneous.

<sup>2</sup>State v. Wimer, 64 Ia. 243; State v. Berry, 12 Ia. 58; Alcott v. Acheson, 49 Ia. 569.

<sup>3</sup>If the way is one which can not be

used because of natural obstacles, a prosecution for obstructing it will not lie until such obstacles are removed. State v. Shinkle, 40 Ia. 131.

<sup>4</sup>This distinction is asserted and enforced in the case of State v. Holman (Minn.), 41 N. W. R. 1073, and Kimball v. Homan (Mich.), 42 N. W. R. 167.

street for travel would involve a considerable expenditure of money, and there is neither jurisdiction of the subject nor an adequate legal remedy, a tax payer may restrain the officers from opening the road or street by injunction.<sup>1</sup> A tax payer has such a special interest in preventing the use of the public funds for an unlawful purpose as entitles him to maintain an injunction against the officers who threaten to make such a use of the public funds raised by taxation. Courts are reluctant to interfere by injunction with the acts of municipal officers, and will not do so where there is nothing more than a mere irregularity in the proceedings establishing or opening a street.<sup>2</sup> The authorities are generally agreed that where there is a plain and adequate remedy at law injunction will not lie,<sup>3</sup> but there is much diversity of opinion as to what shall be deemed a complete and adequate legal remedy. Where, however, there is some legal remedy, but it is clearly inadequate to give the relief to which the complainant is entitled, he may have an injunction.<sup>4</sup> A mere general interest in the matter as a member

<sup>1</sup> *Crampton v. Zabriskie*, 101 U. S. 601; *Normand v. Otoe Co.*, 8 Neb. 18; *Ayres v. Lawrence*, 59 N. Y. 192; *Hulburt v. Bank*, 1 Abbott's New Cases, 157; *State v. Saline Co.*, 51 Mo. 350, S. C. 11 Am. R. 454; *Hooper v. Ely*, 46 Mo. 505; *Harvey v. Indianapolis*, 32 Ind. 214; *Port v. Russell*, 36 Ind. 60; *McAden v. Jenkins*, 64 N. C. 796; *First National Bank, etc., v. Cook*, 77 Ill. 622; *Branderf v. Harrison Co.*, 56 Iowa, 164; *Dupage Co. v. Jenks*, 65 Ill. 275; *Lebanon, etc., Co. v. Ohio, etc., R. R. Co.*, 77 Ill. 539; *Wade v. Richmond*, 18 Gratt. 583; *Douglass v. Placerville*, 18 Cal. 643; *Stevens v. Railroad Co.*, 29 Vt. 546; *Gifford v. Railroad Co.*, 10 N. J. Eq. 171; *Baltimore v. Gill*, 31 Md. 375; *New London v. Brainard*, 22 Conn. 552; *City of Richmond v. Davis*, 103 Ind. 449.

<sup>2</sup> *Sheldon v. School Dist.*, 25 Conn. 224; *Holmes v. Jersey City*, 1 Beas. N. J. 299; *Cross v. Mayor*, 3 C. E. Green, 305; *Tainter v. Mayor*, 4 C. E. Green, 46.

<sup>3</sup> *Dows v. Chicago*, 11 Wall. 108; *Commonwealth v. Wellsboro, etc., Co.*, 35 Pa. St. 152; *Hyatt v. Bates*, 35 Barb. 308; *Albany, etc., Co. v. Brownell*, 24 N. Y. 345; *Dodd v. Hartford*, 25 Conn. 232; *Milwaukee Iron Co. v. Hubbard*, 29 Wis. 51; *McMasters v. McHolland*, 12 Kan. 17; *Sims v. City of Frankfort*, 79 Ind. 446; *Mayor v. Markham*, 23 Ga. 402. The statutory or legal remedy must be first exhausted, or it must be shown that it is inadequate. *Nichols v. Salem*, 14 Gray, 490; *Beckner v. Warner*, 22 Ohio St. 275; *Parham v. Justices*, 9 Ga. 341; *Frevert v. Finrock*, 31 Ohio St. 621.

<sup>4</sup> *Watson v. Sutherland*, 5 Wall. 74; *English v. Smock*, 34 Ind. 115, S. C. 7 Am. R. 215; *Bishop v. Moorman*, 98 Ind. 1; *Keene v. Bristol*, 26 Pa. St. 46. In the case first cited the supreme court of the United States said: "It is not enough that there is a remedy at law; it must be plain and adequate, or, in other words, as efficient and practical

of the community will not entitle a party to an injunction to prevent the opening of a public road; it must appear that he has a special right of which there will be an infraction causing him loss unless an injunction issues.<sup>1</sup>

It may not be so far outside of the general scope of our discussion as to be irrelevant to remark that the legislative or discretionary authority of municipal officers will not be controlled by injunction.<sup>2</sup> It follows from this generally accepted doctrine that it is not until the municipal officers attempt or threaten to execute the order by ministerial acts that the courts will interfere by restraining the proceedings.

Where a party seeks an injunction against an officer who asserts a right to open a highway he must rebut, by proper averments, the presumption that the officer will exercise due care and skill.<sup>3</sup> Nor will the opening of a road be enjoined in a case where it appears that an inconsiderable outlay will prevent the threatened injury.<sup>4</sup> The destruction of valuable property rights by raising the grade of a street is more than a mere fugitive trespass, and an injunction will be awarded.<sup>5</sup> Where a land owner, whose right to build beyond a certain line is contested, hastens to erect a building, and thereby defeat or embarrass the opening of a street, injunction will lie at the suit of

to the ends of justice, and its prompt administration, as the remedy inequity." It seems to us that the tendency of modern thought is to extend the remedy by injunction, and this we believe to be wise and expedient. 3 Pomeroy's Equity, section 1399. See, also, cases cited in *Bishop v. Moorman*, *supra*.

<sup>1</sup> *Prince v. McCoy*, 40 Ia. 533; *Patterson v. Chicago*, etc., R. R. Co., 75 Ill. 588. A tax payer whose taxes will be increased by the unlawful expenditure of money is generally regarded as having such a special interest as will, in the proper case, entitle him to an injunction.

<sup>2</sup> *Montgomery Gaslight Co. v. City Council of Montgomery* (Ala.), *Lawyers Annotated R.*, Book 4, 616; *Des Moines Gas Co. v. Des Moines*, 44 Ia.

505, S. C. 24 Am. R. 756; *Chicago v. Evans*, 24 Ill. 52; *Sheridan v. Colvin*, 78 Ill. 237; *Smith v. McCarty*, 56 Pa. St. 359; *City of Richmond v. Davis*, 103 Ind. 449; *Western Union Tel. Co. v. New York* (Fed. Rep.), *Lawyers Rep. Annotated*, Book 3, 449; *Pedrick v. Ripon* (Wis.), *Lawyers Rep. Annotated*, Book 3, 269. Compare *State v. Patterson*, 34 N. J. L. 163; *State v. Jersey City*, 31 N. J. L. 390; *Forcheimer v. Mobile*, 84 Ala. 126, S. C. 4 S. R. 112.

<sup>3</sup> *Randall v. Christiansen*, 76 Ia. 169, S. C. 40 N. W. R. 703. He must also show a clear right. *Smith v. Navasota* (Tex.), 10 S. W. R. 414.

<sup>4</sup> *Wilson v. Duncan*, 74 Ia. 491.

<sup>5</sup> *Vanderlip v. City of Grand Rapids Co.* (Mich.), 41 N. W. R. 677.

the municipality.<sup>1</sup> Officers prosecuting a public work may be aided by an injunction preventing wrongful interference with their duties.<sup>2</sup>

<sup>1</sup> *Verga v. Miller* (N. J.), 15 Atl. R. 835.

<sup>2</sup> *Elk County v. Earley* (Pa.), 15 Atl. R. 602.

## CHAPTER XVIII.

### URBAN AND SUBURBAN SERVITUDES.

There is an essential difference between urban and suburban servitudes. The owner of the dominant estate in an urban servitude has very much more authority and much greater rights than the owner of the dominant estate in a suburban servitude. The easement of the one is very much more comprehensive than that of the other. It is doubtful whether, of all servitudes, there is one so broad and comprehensive as that of a city in its streets. On the other hand, the easement of the public in a suburban road is not much greater than many merely private easements, if, indeed, it is as great. City officers in charge of streets may do many things that rural highway officers have no authority to do, for the authority of the one class of officers extends far beyond that of the other class. Many of the rules which apply to the one class of easements are wholly without force as against the other class. Decisions affecting streets can not always be considered as of force or relevancy where country ways are the subject of litigation.

A land owner, who dedicates a strip of ground for a street, sets it apart to a very different use from that to which one devotes land which he dedicates for a country road. The one parts with many rights and privileges which the other retains. The owner of the fee of a rural highway may make many uses of it which the owner of the fee of a street in a city can not. Private ownership in the fee of a street does not carry any general right to use the street for private purposes or profit, while the owner of the fee in a country road retains many privileges and rights.<sup>1</sup> These rights of the rural proprietor the local officers can seldom take from him. They can, it is certain, only deprive him of them when it is necessary to make the highway safe and convenient

<sup>1</sup> See Rights of Abutters, Chapter XXVI.



for travel. How far these officers may go in this direction may be matter of debate, but we think it clear that they can not go farther than to make and maintain the way safe, free, and convenient for the use of those who have the right of passage. The standard by which the authority and the right of the local officers in control of suburban roads are to be measured is fixed by law, for they have no authority to make any other use of the way than that to which it was dedicated, or for which it was appropriated under the right of eminent domain. In the case of a dedication the law enters into the act as a silent but potent factor, and fixes the respective rights of the owners of the dominant and servient estates, and in the case of a seizure, the owner receives compensation only to the extent to which his property is taken or injured. In neither case, therefore, does he part with any other right than such as is embraced within the right of the public to use the land acquired from him for a country road.

Whatever is necessary to be done in order to make a safe, convenient, public country road, the highway officers may lawfully do, and there may be cases where the necessity will be such as to exclude the owner from using any part of the surface of the way for any permanent private purpose. It is not possible to lay down a rule which will fit all cases and justly determine how far the local officers may go, for it is evident that each case may be modified by its attendant facts. Thus, in a populous neighborhood near a town or city, it may be necessary to pave or gravel the road from side to side, and to exclude the owner of the fee from the right of pasturage or herbage. In respect to the rights of one who grants land for a street, or of one from whom land is taken for a street under the right of eminent domain, there is much less difficulty. The officers of the city may make any legitimate public use of a street which does not impair or obstruct its use as a highway for travel or permanently abridge the right of an abutter to enjoy, freely and conveniently, ingress and egress to and from his property. The municipal officers may dig beneath the surface and construct drains or sewers, and they may use the space above the surface when there is no invasion of the right of travel, or of ingress and

egress, or of the like private property rights, whenever the public welfare demands. They can not, of course, change the nature of the way, nor bestow it upon a private corporation.

While the control of the highway officers over a rural road is, as is evident from what we have said, by no means so extensive as that of municipal officers over a city street, still it is extensive enough to authorize the rural highway officers to make it safe and convenient for passage, and to effect this object they may not only pave or gravel the entire width of the way, but they may also use it for incidental highway purposes. They may not use it for purposes entirely disconnected with the purpose to which it was set apart, but they may use it for public purposes legitimately connected with the system of highways of which it forms a part, for, great as are the rights of the owner of the servient estate, they are nevertheless subordinate to the right of the public, and by this paramount right they are always limited.<sup>1</sup>

Suburban roads may be used for public drainage purposes, that is, for draining other public ways.<sup>2</sup> Whether they could be used without additional compensation to the owner of the fee for the purpose of constructing drains for reclaiming private property is a question of no little difficulty, even if such drains are a public benefit. We are inclined to the opinion that such a use can not be made of them without compensation, for the only purpose for which they were set apart is that of a highway for travel, while the whole interest and profit in the land remains in the owner of the fee, subject only to the easement of the public. The use of a way for the purpose of constructing drains, for other than legitimate highway purposes, can not, as we believe, be justly considered as included in the public use to which the suburban way was set apart.<sup>3</sup>

<sup>1</sup>The rights of the public are such, however, as pertain to a public highway, and rights of a different nature do not vest in the public when a way is set apart, by dedication or otherwise, for travel.

<sup>2</sup>*Cummins v. City of Seymour*, 79 Ind. 491. But we suppose that the local

officers could not destroy the road by construction of drains, or destroy the right of access.

<sup>3</sup>*Murray v. Gibson et al.*, 21 Ill. App. R. 488; *Indiana, etc., R. R. Co. v. Hartley*, 67 Ill. 439; *Board of Trade v. Barnett*, 107 Ill. 507. In the case first cited it was said that, "We think it clear that

The right to construct drains and sewers in a suburban road does not extend so far as to authorize the highway officers to use the entire way for drainage purposes, and thus destroy its use as a way for travel, nor, indeed, can such a use be made of an urban street. A highway, whether in town or country, can not be completely destroyed as a passage way by devoting it to an entirely different public use, without inflicting special injury upon the abutters, and if such an injury is inflicted, a right of action accrues. While the entire control of the way is in the local authorities to whom it is committed, they are the instrumentalities of the State, and they control the highway for the public, but they can not devote it to any purpose that will be destructive of its character as a public way for travel. They hold it in trust for the specific purpose to which it was dedicated, or for which it was appropriated.<sup>1</sup>

Individual owners of abutting property have a private interest in the highway distinct from the public, of which they can not be deprived without compensation. Of this right they can not be deprived by any use that destroys the character of the road or street as a way for free and unobstructed passage.<sup>2</sup> While, therefore, a highway may be used for public drains, the use must be such as will not destroy the original and primary character of the public way. The old rule that although there be an unlawful interference with a highway, "without a special grief shown by the plaintiff the action lies not, but is punishable in the leet,"<sup>3</sup> does not preclude adjoining property owners

the commissioner of highways had no right to grant to Gibson the privilege to dig the ditch in question, as it would be imposing an additional burden on the appellants' land." It was held that the right to dig such a ditch could not be granted by parol, as the right constituted an interest in land, and the cases of *Woodward v. Seeley*, 11 Ill. 157, *Tanner v. Volentine*, 75 Ill. 624, *Kuhlman v. Hecht*, 77 Ill. 577, *Forbes v. Balenseifer*, 74 Ill. 183, *Kamphouse v. Gaffney*, 73 Ill. 454, and *St. Louis Stock Yards v. Wiggins Ferry Co.*, 102 Ill. 520, were cited in support of this ruling.

The ruling is undoubtedly in accordance with the general rule that an easement is an interest in land and can not be created by parol, but there may be some difficulty in maintaining the assumption that the privilege may not be created by a parol license.

<sup>1</sup>*Transportation Co. v. Chicago*, 99 U. S. 635.

<sup>2</sup>*State v. Berdetta*, 73 Ind. 185; *Cummins v. City of Seymour*, 79 Ind. 491; *Cooley's Const. Lim.* (4th ed.) 676. See, also, *Rights and Remedies of Abutters*, Chapter XXVI.

<sup>3</sup>*Fincux v. Horenden*, Cro. Eliz. 664.

from maintaining an action for the destruction of a highway, for in such a case they have "a private grief."

The limited and restricted nature of the servitude of a suburban road undoubtedly leaves a very much greater right and interest in the owner of the servient estate than that which remains in the owner of a like estate in a city street,<sup>1</sup> but it is not possible, under the authorities as they now stand, to mark with exactness and precise accuracy the extent of the interests and rights which remain in the owner of the servient estate in a country road. The best that can be done is to refer to some of the adjudicated cases and note the current of judicial thought.<sup>2</sup> In one case the court held that a pipe for conducting gas from point to point could not be laid in a rural public way without the payment of compensation to the owner of the fee.<sup>3</sup> The decision in that case was placed upon the ground that, "The appropriation of land for the use of a highway is for a specific purpose, and the public thereby acquire a mere right of passage, with the powers and privileges which are incident to such a right." It is clear that the principle on which the decision under immediate mention proceeds is a just and well settled one, and the only difficulty that can ever arise so long as this fundamental principle is not departed from, is upon the question as to what can properly be deemed incidents of the principal right, and, in our judgment, the court correctly solved that question in the case from which we have quoted, although some of the expressions in the opinion are, perhaps, not strictly accurate. A Pennsylvania case involved a similar question and the same conclusion was reached as that declared in the case

<sup>1</sup>See Local Control of Roads and Streets, Chapter XIX.

<sup>2</sup>Board of Trade Co. v. Barnett, 107 Ill. 507; Indiana, etc., R. R. Co. v. Hartley, 67 Ill. 439.

<sup>3</sup>Bloomfield, etc., Gas Light Co. v. Calkins, 62 N. Y. 386. In the course of the opinion the court cited the cases of Cortelyou v. Van Brunt, 2 Johns. 357, Jackson v. Hathway, 15 Johns.

447, *Gidney v. Earl*, 12 Wend. 98, *Pearsall v. Post*, 20 Wend. 111, and said: "The owner's right is absolute to maintain ejectment or trespass, to use and enjoy the soil, reap any profits arising therefrom, and to use the highway for his individual purposes in any way consistent with the easement or servitude which its appropriation for a road warrants."

we have just considered.<sup>1</sup> In the Pennsylvania case the court stated with clearness and precision the rights of the owner of the fee in a country road and said: "In other words, the only servitude imposed on the land is the right of the public to construct and maintain thereon a safe and convenient roadway, which shall at all times be open and free for public use as a highway." If this premise be granted, and it can not well be denied, there would seem to be no doubt as to the correctness of the conclusion that laying gas pipes is not a purpose legitimately connected with the use of the land as a way for public travel. If the light is for the highway and is necessary to make it safe and convenient for free passage, then it is probable that the highway officers would have a right to dig trenches and lay pipes, for we think it must be the law that where it is necessary to secure gas to light the public way, and thereby make it safe, the highway officers may use the way for a pipe line. To make our meaning plain, suppose, for example, there is a dangerous bridge or other place in a rural highway much traveled after night, and that the best and most convenient mode of lighting and making it safe is by conveying gas to it from a place near by, would not the highway officers have a right to dig trenches and lay pipes in the road for the purpose of lighting the dangerous place and thus make it safe for passage? To our minds it seems clear that they would have this right. But it by no means follows from this that they would have any general right or authority to dig trenches or lay pipes in the road, or to permit it to be done by private corporations. Suppose, however, a case of more difficulty, such, for instance, as that of a city or county desiring to obtain gas for lighting public streets or public buildings, could such a public corporation lawfully use a county road for the purpose of laying the necessary pipe line?

<sup>1</sup> Sterling's Appeal, 111 Pa. St. 35, S. C. 2 Atl. Rep. 105. The court in its opinion said: "Laying and maintaining a pipe line, at the ordinary depth under the surface, necessarily imposes an additional burden on the land, not contemplated either by the owner or by the public authorities when the land

was appropriated for the purposes of a public road. It is a burden, moreover, which, to some extent, at least, abridges the rights of the land owner in the soil traversed by the road, and hence it is a taking within the meaning of the constitutional provision."

The right of eminent domain may undoubtedly be exercised by a corporation when authorized by statute for the purpose of supplying a town or city with natural or artificial gas,<sup>1</sup> but this does not meet the question suggested by the supposed case, for the question is, how far do the rights of the public in a rural road extend? It is, of course, not enough to show that the second use is a public one, for it may be that in the strictest sense and yet be an additional burden.

The streets of a city may be used for laying pipe lines, and this is so, although there may be no express statutory provision authorizing the municipality to permit such a use. Where a municipal corporation has power to light its streets, or to supply itself with water, it has, as an incidental power, the authority to permit the necessary pipe lines to be laid in the public streets.<sup>2</sup> But a gas or water company has no right to dig into the streets of a city without the consent of its officers,<sup>3</sup> except, perhaps, in cases where the charter of the company confers that right. Laying water or gas pipes in a street is not an additional burden entitling the owner of the fee to additional compensation.<sup>4</sup> Reservoirs and cisterns may be dug in city streets.<sup>5</sup> Sewers and drains may be constructed in public streets when required for corporate purposes.<sup>6</sup>

Some of the courts make a distinction between cases in which the fee is in the municipality and those in which it is in the adjoining owner, but, in our judgment, there is, so far, at least, as respects the subject under immediate discussion, no valid rea-

<sup>1</sup> *Bloomfield Gas Co. v. Richardson*, 12 How. Pr. Rep. 187; *People v. Bowen*, 63 Barb. 438; *Johnston's Appeal* (Pa.), 30 Barb. 24; *City of Indianapolis v. Indianapolis Gas Light Co.*, 66 Ind. 7 Atl. Rep. 167; *Citizens' Gas Co. v. Indianapolis Gas Light Co.*, 66 Ind. 396. *Town of Elwood*, 114 Ind. 332; *Carother's Appeal*, 118 Pa. St. 468; *Columbia Conduit Co. v. Com.*, 90 Pa. St. 308; *State v. Indiana, etc., Co. (Ind.)*, 22 N. E. R. 778; *Avery v. Indiana, etc., Co. (Ind.)*, 22 N. E. R. 781.

<sup>2</sup> *City of Quincy v. Bull et al.*, 106 Ill. 337, S. C. 4 Am. & Eng. Corp. Cases, 554; *State, ex rel., v. Cincinnati, etc., Co.*, 18 Ohio St. 295; *Des Moines Gas Co. v. Des Moines*, 44 Ia. 508; *Smith v. Metropolitan Gas Light Co.*, 126

<sup>3</sup> *Citizens', etc., Co. v. Town of Elwood*, 114 Ind. 332.

<sup>4</sup> *Crooke v. Flatbush Water Works Co.*, 29 Hun. (N. Y.) 245.

<sup>5</sup> *West v. Bancroft*, 32 Vt. 367. Cisterns may be dug at the expense of the property owners specially benefited. *Louisville v. Osborne*, 10 Bush. (Ky.) 226.

<sup>6</sup> *Cincinnati v. Penny*, 21 Ohio St. 499.

son for the distinction thus declared to exist. The easement which the municipal corporation acquires is broad enough to authorize the corporate officers to make any legitimate use of the street which does not impair its character as a public way or interfere with its free and unobstructed use. The owner who dedicates ground for a street creates an easement extensive enough to permit the city to make any legitimate public use of it which does not impair the right of passage, or the right of ingress and egress to and from adjoining property. So, when the land is taken under the right of eminent domain, all is taken that is necessary to make the street a public way in all that the term implies. The right acquired by the public, whether acquired by grant or seizure, is a right to use the street as city streets are ordinarily used, and to devote it to such purposes as those for which city streets are ordinarily appropriated. The easement acquired is by no means confined to the right of passage or travel, for it is matter of common knowledge and, therefore, of law, that land acquired for a public easement is subject to all the burdens incident to that easement. If the public corporation owns the fee its rights are, of course, nearly as absolute as those of any owner can be, and the question of what it may do with its own property is to be determined as if it were a private owner in a like situation, but where it owns an easement it owns whatever is essential to the full enjoyment of that easement, and the question, so far as it affects this phase of the subject, whether it owns the fee or an easement, is of little consequence. If it owns the dominant estate it is entitled to use and enjoy all the incidents of that estate. Judge Dillon says: "It will never do to hold that a municipality invested with the control of streets, and charged with the duty of preserving the public health, promoting the public convenience and of making provision to extinguish fires, may not, if it deems it expedient, construct a subterranean sewer or reservoir in the middle of the street without the assent of the opposite lot owners."<sup>1</sup> The learned

<sup>1</sup>2 Dillon *Municip. Corp.* (3d ed.), streets for public purposes, whether as section 690. In *Barter v. Com.*, 3 highways or places for cisterns or Pa. 259, Chief Justice Gibson said: wellis, is a proposition about which "That the government of every incor- there can be little dispute. It is difficult to imagine a subject to which the

author is undoubtedly right, for the question is not whether the municipality owns the fee, but what is the extent of its easement? Whatever easements of like nature vest in the owner of the dominant estate are vested in the municipality, and it may make any use of the way it deems expedient, provided it does not use the way for a purpose foreign to that for which it was set apart, but using it for sewers, cisterns and the like is not foreign to the purpose for which the land was dedicated or condemned. The easement in a city is so broad and exclusive as to leave very little, if any, private right of use in the owner of the servient estate.

The difference in the character of urban and suburban servitudes, and the fact that the one is so much broader than the other, supply the most plausible reason that can be assigned for discriminating between the liabilities of such governmental corporations as cities and such public corporations as counties for negligence in suffering highways to become unsafe. The control of cities over the surface of a street is almost unlimited, and they can do whatever is necessary to make it safe and convenient for travel without regard to the interests of the owner of the fee, whereas the power of counties is more limited. It is not entirely unjust to hold that the more comprehensive the power the greater the liability. But, after all, the reason is plausible rather than forcible, for, as both corporations are governmental instrumentalities, it is not easy to find a reason for holding either liable for a neglect of a delegated governmental duty, and it is still more difficult to find and state a valid reason why the one should be liable and the other not where there is no statute creating a liability. It can not be justly said that the regulation and control of highways is not a governmental matter, for it was so in the earliest years of the common law, and, indeed, long before the common law took form and force.<sup>1</sup>

The difference in the extent of the servitude, in the authority of the local officers and in the nature and situation of rural incidental rights of a municipal corporation more appropriately extend and these, where they exist at all, are necessarily exclusive." Approved in *Bran-*

*son v. City of Philadelphia*, 47 Pa. St. 329.

<sup>1</sup>Gibbon's *Decline and Fall*, 66, 67, *n*;  
20 *Encycl. Brit.* (9th ed.), 582, title  
*Roads and Streets*.



roads, supplies strong reasons for discriminating actions against cities and towns from actions against counties and townships to recover damages for special injuries caused by negligence in constructing and maintaining roads and streets. In the case of a city, the territory is comparatively small, the streets are in almost constant use, the officers more numerous, the means of improving and repairing are at ready command, the necessity for vigilance and care is great, and the means of knowledge easily attainable, whereas in the case of a sparsely inhabited rural district it is essentially different. Negligence is seldom absolute, for whether an act is or is not negligent generally depends upon attendant facts and circumstances. What would be ordinary care in a country district, and in maintaining a secluded highway, may not be care of any reasonable degree in a populous city or in maintaining a much traveled street. In respect to the question of notice, which is often a conspicuous element in actions against public corporations to recover damages resulting from a special injury, the fact that the way is in a rural district and not in a city must often exert an important influence. Care is proportioned to the danger that may be reasonably apprehended, and duty is measured by the means, opportunities and obligations supplied and imposed by the law upon the officers to whom is committed the care and control of the public ways of the State. It would be plainly unjust to measure the obligations and duties of officers in charge of rural highways by the rules which govern officers placed in charge of the streets of a town or city. What would be care and diligence on the part of the one class of officers may often be culpable negligence on the part of officers of the other class.

The common law guards with jealous care the rights of the owner of the servient estate in a suburban road against encroachment by individuals, and holds them very strictly to the use of the road for the purpose of passing and repassing. In one of the decided cases a shaft was run across the road underneath a bridge or platform, and it was held that the owner of the fee was entitled to maintain an action for the invasion of his rights as such owner.<sup>1</sup> In an English case a man passing

<sup>1</sup> *Esty v. Baker*, 48 Me. 495.

along the road sent his dog into the plaintiff's close adjoining the way, the dog flushed a pheasant, the man shot at it as it flew across the way and it was held that he was liable as a trespasser.<sup>1</sup> A very similar doctrine was laid down in an American case, and the court, in the course of its opinion, asserted that a man would have no right to play a tune or sing a song on the highway in front of the premises of the owner of the servient estate.<sup>2</sup> In accordance with the general doctrine it has been held that the highway officers can not rightfully conduct water from a spring on one side of the road to a public watering trough on the other side.<sup>3</sup>

We have employed the term "easement" as descriptive of the estate which the public acquires in a road or street, and we think the term an appropriate and significant one. The later English cases, building upon a distinction, fanciful rather than substantial, hold that the right which the public acquires is not an easement.<sup>4</sup> In our judgment the distinction is too subtle and shadowy to be of any practical utility and is the result of a refinement made at the sacrifice of sound principle. At all events, the use we have made of the term is fully sanctioned by the earlier English cases<sup>5</sup> and by the American authorities.<sup>6</sup> We believe that the right of the public is an easement and that

<sup>1</sup> *Regina v. Pratt*, 4 El. & Bl. 860, S. C. 24 L. M. J. C. 113. Lord Campbell said: "Then Pratt being on the land was undoubtedly a trespasser if he went there not in the exercise of the right of way, but for the purpose of seeking game and that only." Compton, J., said: "Now I take it as clear law that, if a man use the land over which there is a right of way for any purpose, lawful or unlawful, other than that of passing or repassing, he is a trespasser."

<sup>2</sup> *Adams v. Rivers*, 11 Barb. 390. The court said, among other things, that: "The public have no need of the highway but to pass and repass. If it is used for any other purpose not justified by law, the owners of the adjoining land are remitted to the same rights

they possessed before the highway was made. They can protect themselves against such annoyances by treating the intruders as trespassers." See *post*, Chapter XXVI.

<sup>3</sup> *Suffield v. Hathway*, 44 Conn. 521.

<sup>4</sup> *Ackroyd v. Smith*, 10 C. B. 164; *Rangely v. Midland R. R. Co.*, L. R. 3 Ch. App. 306.

<sup>5</sup> *Dovaston v. Payne*, 2 H. Bl. 527.

<sup>6</sup> *Denniston v. Clark*, 125 Mass. 216; *Hovey v. Mayo*, 43 Me. 322; *New Haven v. Sargent*, 38 Conn. 50; *Hampson v. Taylor* (R. I.), 3 New Eng. R. 640; *Dubuque v. Maloney*, 9 Ia. 450; *Overman v. May*, 35 Ia. 89; *Baker v. Boston*, 12 Pick. 184. Washburne says: "Highways, for instance, are regarded as easements." Washburne on Easements (4th ed.), 252.

the owner of the fee remains the owner of the soil, springs, mines, quarries, timber and the like, except in so far as the public officers may have a right to use suitable materials for improving or repairing the road.<sup>1</sup>

The right of the citizen, other than the owner of the fee, in a suburban road is to use it for travel. As an English writer puts it: "For instance, the owner of the soil of the way has a right to all above and under ground, except only the right of passage for the King and his people. If, therefore, a nuisance be erected upon the road, the owner may maintain a possessory action to recover his right, and, accordingly, where the encroachment had been made by building a wall, the plaintiff was allowed to maintain ejectment."<sup>2</sup> The principle embodied in the statement we have quoted excludes a private citizen, other than the owner of the servient estate, from any use of the road except for passage. If he makes use of it for any other purpose he is a wrong-doer. His rights are much more limited than those of the officers to whom the law has committed the care and control of the road. The officers may dig into the way, they may use soil, stones, and gravel for the purpose of improving or repairing it, but a private citizen has no right to undertake to improve or repair the way or to remove soil or gravel from it.<sup>3</sup> If it is necessary, to make access to the abutting property more convenient, the owner of the servient estate in a rural road may spread soil upon it to make it more level, provided in so doing he does not make the way less convenient for travel nor inter-

<sup>1</sup> St. Mary, etc., Co. v. Jacobs, L. R., 7 Q. B. 47; Reed v. Leeds, 19 Conn. 188; Perley v. Chandler, 6 Mass. 454; Jackson v. Hathway, 15 Johns. 447; Westbrook v. North, 2 Me. 179; Harback v. Boston, 10 Cush. 295; Harris v. Elliott, 10 Peters, 55; Phifer v. Cox, 21 Ohio St. 248; Hollenbeck v. Rowley, 8 Allen, 473; Lyman v. Arnold, 5 Masson C. C. 198. In Viliski v. City, 41 N. W. R. 1050, it is held that a city has no right to stone not required for the improvement of the street.

<sup>2</sup> Woolrych on Ways, 53; Bacon's

Abridg., title Highways. We have discussed the rights of abutting owners in another place, *post* Chapter XXVI.

<sup>3</sup> Gidney v. Earl, 12 Wend. 98; Cortelyou v. Van Brunt, 2 Johns. 357; Robbins v. Borman, 1 Pick. 122. The highway officers may authorize a citizen to make needed repairs, and, as we think, there may be cases where the citizen might in case of necessity make such repairs himself. Hunt v. Rich, 38 Me. 695; Morse v. Weymouth, 28 Vt. 824; Bush v. Steinman, 1 B. & P. 407.

fere with the plan of the improvement adopted by the highway officers.<sup>1</sup>

The easement which the public have in a suburban road the owner of the fee has no right to permanently or materially disturb. He has no right to deposit wood or other like property on the way permanently, but he may place building materials on it, provided the use thus made of the highway is reasonable as to the time they are allowed to remain and the space they are permitted to occupy.<sup>2</sup> He has no right to do an act on his own land outside of the limits of the road which will make the way inconvenient or dangerous, nor has he a right to deprive the highway of the lateral support given it by his adjoining land.<sup>3</sup>

Where land is dedicated or appropriated for a suburban road the implication must be that it shall be used as the convenience and welfare of the public may demand, although that demand may be augmented by the increase in population or by a town or city springing up in the territory traversed by the road. Under the ancient maxim, "Once a highway always a highway," the road continues to exist for all lawful purposes to which a highway of its class may be devoted, unless it is abandoned or vacated in due course of law.<sup>4</sup> This subject is, however, generally covered by statute, and recourse must, of course, be had to the statute to determine what rights a town or city has over roads laid out as public suburban ways, but it may be said that where a town or city grows up within a territory traversed by rural public roads, they pass under the jurisdiction of the municipal corporation unless some different provision is made by statute.<sup>5</sup> As we have said in another place, all streets are highways, but not all highways are streets.<sup>6</sup> The nature of the two servitudes—urban and suburban—quite clearly shows the essential and radical difference between the two classes of pub-

<sup>1</sup> *O'Linda v. Lothrop*, 21 Pick. 292; 311: *Clark v. Commonwealth*, 14 Bush. Underwood *v. Carney*, 1 Cush. 285. (Ky.) 166.

<sup>2</sup> *Mallory v. Griffey*, 85 Pa. St. 275.

<sup>3</sup> *Milburn v. Fowler*, 27 Hun. (N. Y.), 568.

<sup>4</sup> *McCain v. State*, 62 Ala. 138.

<sup>5</sup> *Cowan's Case*, 1 Overton (Tenn.),

<sup>6</sup> *Indianapolis v. Croas*, 7 Ind. 9; *Lafayette v. Jenners*, 10 Ind. 74; *Clark v. Commonwealth*, 14 Bush. (Ky.) 166; *ante*, Chapter II.

lic ways, for, while the primary and principal right of the public in both is the right to freely pass and repass, the servitude in an urban way is, as we have seen, much more extensive.

It is obvious that the officers having control of county affairs can not justly be permitted to control the streets of a city, and for this conclusion there are at least two satisfactory reasons. It would violate the principle of local self-government to permit officers elected to govern one corporation, to control the public ways within another and distinct corporation, for the officers of one corporation can not be considered the representatives of another and different corporation. It is not the officers who constitute a public corporation, nor the frame of its government, but the people of the locality. The legislature may provide a frame or form of government, but it can not create a town or a city, because towns and cities are composed of the inhabitants who dwell in a designated territory.<sup>1</sup> Officers chosen to conduct county or township affairs can not, in the nature of things, be presumed to possess such authority as will enable them to control streets, and the liability of a town or city is radically different from that of a county or township. It is, however, not to be inferred that the legislature does not possess very comprehensive power over roads and streets and that it may not prescribe rules for their control.<sup>2</sup> Whenever, therefore, there is a valid statute providing what officers shall control highways it will be the guide as to their rights and duties.<sup>2</sup> How far the legislature may go in this direction it is foreign to our purpose to inquire.

There is some conflict in the cases as to whether the erection of a municipal corporation does of itself oust the jurisdiction of the county or township officers over existing highways.<sup>3</sup> Our

<sup>1</sup>City of Valparaiso v. Gardner, 97 Ind. 1; Lowber v. Mayor, etc., 5 Abb. Pr. R. 325; Clark v. City of Rochester, 24 Barb. 446.

<sup>2</sup>Norwich v. Story, 25 Conn. 44; Wells v. McLaughlin, 17 Ohio, 99; Butman v. Fowler, 17 Ohio, 101; Road in Milton, 40 Pa. St. 300.

<sup>3</sup>State v. Jones, 18 Tex. 874; Cowan's Case, 1 Overton, 311; Pope v.

Commissioners, 12 Rich. (S. C.) Law, 407; Knowles v. Muscatine, 20 Ia. 248; McCullom v. Blackhawk Co., 21 Ia. 409; Clark v. Com., 14 Bush. (Ky.) 166; Baldwin v. Green, 10 Mo. 410; Ottawa v. Walker, 21 Ill. 605. But compare O'Kane v. Treat, 25 Ill. 458; Sparling v. Dwenger, 60 Ind. 72; State v. Mainey, 65 Ind. 404.

opinion is that as soon as a town or city is incorporated, the public ways, that is, ways belonging to the public and not owned by private corporations, come within the jurisdiction and control of the new public corporation, unless the statute expressly or impliedly continues the authority of the county or township officers. It is apparent that the ways must, of necessity, change character and the servitude be much extended. This extension carries with it wider duties, and greater liabilities, thus requiring an essentially different control and care. The authority of county and township officers can not be the same as that of city or town officers, and their power is consequently not adequate to the duty and the responsibility which the change from suburban to urban highways creates. The added responsibility, and the augmented duty require broader authority than that requisite for the care and control of rural roads.

The decisions in New England do not afford much assistance on this question, for the doctrine which there prevails is, as we have said, a peculiar one, and different from that which obtains in most of the States. Where there is no statute, the incorporation of a city seems naturally to imply that the highways within its territorial limits become streets, and, as such, subject to the control of the municipality. The erection of such a corporation is, in truth, simply the creation of a new instrumentality of government; it comes into existence with the rights, powers, and duties of a governmental subdivision, and it is but reasonable to conclude that as to such matters as streets, which peculiarly pertain to municipal corporations, the authority of other governmental corporations is excluded. There is an essential difference between cases where the matter is a general governmental one, and cases where the matter is so peculiarly one of municipal control and local interest as streets, and it seems to us that some of the courts have been misled by supposing an analogy to exist between the two classes when, upon analysis, it will be found there is none.<sup>1</sup> Other courts, as it appears to us, have left out of consideration two very important matters,

<sup>1</sup> We venture to say that this is true to no other case, losing sight of the fact of the case of *Baldwin v. Green*, 10 Mo. 410. There the court refers for authority to *State v. Harrison*, 9 Mo. 530, and that the case referred to belongs to an entirely different class.

that the express mention of one thing implies the exclusion of all others, and that the object to be accomplished by a statute must be regarded as well as the subject intended to be covered, and have erroneously held that the affirmative grant of power to a municipal corporation does not exclude other public corporations from the control of the streets within the town.<sup>1</sup> It can not be justly inferred that the legislature meant to vest two distinct and different governmental subdivisions with control of the same subject, for it is evident that conflict and confusion must be a consequence of such a holding, and it ought not to be inferred without strong reason that the legislature intended such a result. The intention to place a subject, where, from the situation and condition of the things affected, that is, the roads and streets, the duties, powers, and responsibilities of the respective public corporate officers are so essentially different, under the control of two entirely different governmental corporations ought not to be imputed to the legislature, except in a very clear case. It is, indeed, by no means clear that officers chosen by a county can be placed in charge of streets which it is the duty of a town or city to maintain safe and convenient for passage; it is not, at all events, just to do so, and this result ought to be avoided by holding, as in truth sound principle requires that the courts should hold, that the creation of a municipal corporation does, in the absence of clear words to the contrary, imply that it shall have control of the streets within its territorial limits to the exclusion of the county and township officers.

Investing "the inhabitants of a locality with the government thereof" is a change in the political or governmental subdivisions, and the natural and reasonable intendment is, that when

<sup>1</sup> This, we believe, may be justly said of the decision in *Bennington v. Smith*, 29 Vt. 254. The court said: "There may be some incongruity in having a concurrent power to lay out and discontinue highways in villages vested in the selectmen of the town and the trustees of the village. But we think if it had been the purpose of the legislature to deprive the selectmen of the town of all

control over the subject, some more specific provisions on the subject would have been considered necessary." We can not resist the conclusion that if the court had applied the familiar principles to which we have referred in the text, the incongruity would have been avoided and the evident intention of the legislature carried into effect.

a new governmental instrumentality is established, it takes control of the territory and affairs over which it is given authority to the exclusion of other local governmental instrumentalities. It displaces the old, and takes its place as its legal successor, and not as an auxiliary. This is the general rule as to school property and the like,<sup>1</sup> and there is much stronger reason for applying this rule to public ways than to other public property, for a municipal corporation becomes liable for failure to keep the public ways safe upon the theory that it has exclusive control over them and the power to raise money to maintain them in safe condition for travel. In creating a town or city the legislature must be deemed to do so with knowledge of the general principles which apply to such political subdivisions and with the expectation that they shall exercise the usual jurisdiction of such subdivisions exclusively, and not divide it with other public or *quasi* public corporations. Acts for the incorporation of towns and cities are directed to a particular subject, and are of greater force, so far as that subject and its incidents are concerned, than laws of a wide and general sweep.<sup>2</sup> The object of incorporating a town or city is to invest the inhabitants of the locality with the government of all the matters that are of special municipal concern, and certainly the streets are as much of special and local concern as anything connected with a town or city can well be. It ought, therefore, to be presumed that they pass under the exclusive control of the municipality as soon as it comes into existence under the law.

If we have not reasoned ill, a suburban servitude may not only be greatly augmented, but, in a measure, transformed by the demand of the public welfare. This conclusion has for its ultimate foundation the old maxim, "That regard be had for the public welfare, is the highest law," and it receives support

<sup>1</sup> Hon. *v. State*, *ex rel.*, 89 Ind. 249; School Town *v. Plain School Tp.*, 86 Ind. 582; School Tp. of Allen *v. School Tp. of Macy*, 109 Ind. 559; School District, etc., *v. Tapley*, 1 Allen, 49.

<sup>2</sup> State *v. Branin*, 3 Zab. N. J. 484; State *v. Mayor*, etc., of Morristown, 33 N. J. L. 57, 61; *In re Goddard*, 16 Pick.

504. The principle which we seek to establish is deducible from the cases cited, although it may be that in one of them the doctrine has been carried too far, but it may be extended far enough to safely warrant the conclusion we have stated in the text.



from the principle, that men are presumed when they do an act to contemplate the natural consequences which may result. It is also true that the benefit which the owner of the servient estate receives from the increase in population, and the building up of cities, far more than compensates him for the increased burden of the servitude which these things produce, so that he suffers no damages, and without damages there can be no right of action.

The expansion of a suburban servitude into an urban one can not be effected in any other mode than by law. The burden may be augmented by the increase in population, thus increasing the necessities of the public, but the character of the way can not be entirely changed except by authority of law, nor, indeed, can the legislature change the primary character of the public easement, since whatever changes may occur in the surroundings, the road or street must remain a public highway until abandoned, vacated or discontinued in due course of law. Where a way is dedicated to a city in trust for the public, the city has no authority, at least in the absence of an express statute, to dedicate it to a county, town or township.<sup>1</sup> The change which takes place in the extent of a servitude in a public way is not effected by the act of the donee, nor, after acceptance, by the act of the donor, but by operation of law, and in order to meet the demands of the public welfare and necessity.

We have had frequent occasion to say that the easement of the public in a rural road consists in the right to use it for the purpose of passing and repassing, and it is, perhaps, needful to define, in a rough way at least, the extent of this right. The right of passage as the old books put it is, "the liberty of all the citizens to pass and repass on foot, on horseback and in carriages and wagons." But the right of passage is broader than the right included in this definition, for it includes the right to drive horses and cattle along the way. A citizen has a lawful right to drive herds of horses and cattle over the road, and if he uses ordinary care, diligence and skill he is not liable for

<sup>1</sup> *Guthrie v. Town of New Haven*, 31 Conn. 308.

injury done by the animals to adjoining property.<sup>1</sup> In a case in Massachusetts cattle entered unfenced land on the side of the road, and it was held that, as they escaped from the road without any negligence on the part of the owner, he was not liable to the owner of the land.<sup>2</sup> Where the animals driven along a highway escape from the person in charge of them and enter upon adjoining land they must be taken from it as soon as it can be done with ordinary care and diligence. What is reasonable care and diligence must, in a great measure, depend upon the circumstances of the particular case, and is, in general, a question of fact for the jury.<sup>3</sup> The rule is, as the cases declare it, that the owner is not bound to fence his land, but if he fails to do so "he must put up with the inconveniences consequent upon it; and one is, that cattle being driven along the road will occasionally stray,"<sup>4</sup> but this does not authorize the conclusion that the owner of the cattle may omit the exercise of reasonable care. If a herd be driven along a road unaccompanied by a number of men reasonably sufficient to control them, and they should escape from the way and enter adjoining land because of the owner's fault in not furnishing men enough to control them, he would be liable for the consequences of his fault. We suppose this would be true if the owner should knowingly attempt to drive animals along the way which were so unruly as to be beyond control. It is only for purposes of passage that the owner has, at common law, a right to take cat-

<sup>1</sup> This rule is a very old one, and in applying it in *Dovaston v. Payne*, 2 H. Blk. 527, the court said: "If one drive a herd of cattle along the highway where trees or wheat, or any other kind of corn is growing, if one of the beasts take a parcel of the corn, if it be against the will of the driver he may well justify, for the law will intend that a man can not govern them at all times as he would."

<sup>2</sup> *Hartford v. Brady*, 114 Mass. 466, S. C. 19 Am. R. 377.

<sup>3</sup> *Goodwyn v. Cheveley*, 4 H. & N. 631.

In this case Bramwell B. directed the jury that it was the duty of the defendant to remove the cattle at once, and he adhered to this opinion on appeal, but the majority held that the question whether the cattle were removed within a reasonable time was one of fact and not of law. The court was unanimous in holding that if there is no negligence where cattle escape from the highway and enter unfenced land, there can be no liability.

<sup>4</sup> Per Martin B. in *Goodwyn v. Cheveley*, *supra*.

tle or horses on the highway ; if he takes them there for any other purpose he is liable for their trespasses.<sup>1</sup>

<sup>1</sup>Stackpole *v.* Healy, 16 Mass. 33; Wormwood, 29 Me. 282; Avery *v.* Lyman *v.* Gipson, 18 Pick. 422; Little Maxwell, 4 N. H. 36; Mills *v.* Stark, *v.* Lathrop, 5 Greenl. R. 356; Lord *v.* 4 N. H. 512.

## CHAPTER XIX.

### LOCAL CONTROL OF ROADS AND STREETS.

Theoretically there is a difference between municipal corporations and counties, and the theory constructed by the decided cases leads to important results in the law of highways. Counties are not, in general, regarded as municipal corporations, but are said to be *quasi* corporations.<sup>1</sup> A county is a public corporation organized by the supreme power of the State for governmental purposes, and as a means of enabling the inhabitants of a designated territorial district to control their local affairs.<sup>2</sup> The type of the American county is the British shire, but the American county is a stronger and more compact organization than the British shire, and it is invested with more comprehensive powers. It is, in truth, a political unit. The Normans seem to have framed the county system, and under the system as they framed it the county was governed by the sheriff, whose power was almost autocratic. It seems that the American decisions which have followed the English doctrine respecting the hundred and the shire have wandered somewhat from the true path, inasmuch as they have lost sight of the important fact that an American county is much more completely organized and possesses much more extensive powers with respect to local affairs than did the English shire or county.<sup>3</sup> In

<sup>1</sup>Dunn v. Wilcox County, 85 Ala. 144, S. C. 4 S. R. 611; Manuel v. Cumberland Co., 98 N. C. 9, S. C. 3 S. E. R. 829; Beach v. Leahey, 11 Kan. 23; Hamilton Co. v. Mighels, 7 Ohio St. 109; Finch v. Board, etc., 30 Ohio St. 37; Askew v. Hale, 54 Ala. 639; State v. Parker, 25 Minn. 215; Harris v. Supervisors, 105 Ill. 451; Washer v. Bull-ett Co., 110 U. S. 564; Vincent v. Lincoln, 30 Fed. R. 749; Hunsaker v. Borden, 5 Cal. 288; Ward v. County, 12 Conn. 404; Emerson v. Washington Co., 9 Me. 88; Long v. Comm'rs, 2 Wall. (U. S.) 501.

<sup>2</sup>Barton Co. v. Walser, 47 Mo. 189; Maury Co. v. Lewis, 1 Swan (Tenn.), 236; Laramie Co. v. Albany Co., 92 U. S. 307; Granger v. Pulaski Co., 26 Ark. 37.

<sup>3</sup>Town and County Government in the English Colonies of North America, Johns Hopkins University Studies, second series, No. X; Howard's Local Const. History of U. S., Chapters VII, VIII, IX, X.

following the English theory the courts have, in many instances, applied a rule to American counties that it is not easy to sustain on solid principle.

As is the case with all public corporations, the legislative power over counties is very broad, and unless restrained by constitutional provisions the legislature may change their frame of government, restrict their rights and increase their liabilities.<sup>1</sup> New counties may be formed from old ones, and the legislature may determine what shall be the duties and liabilities of the old and the new.<sup>2</sup> It is quite clear that the legislature may either charge a county with, or exempt it from, liability for negligence in constructing and maintaining roads. The question of real difficulty arises where there is no statute expressly creating a liability, and where there is a statute charging the county with the duty of maintaining highways and providing it with means of performing that duty.

A county is generally, and, as we believe, correctly, called a public corporation,<sup>3</sup> and in many of the States is expressly declared to be a corporation. Its powers and duties are such as the statute confers and they must be exercised in the mode prescribed by law.<sup>4</sup> In some of the States a county is treated substantially as an ordinary public corporation, and may be sued for a breach of contract, or in trespass, or in any ordinary action for a wrong.<sup>5</sup>

<sup>1</sup> McDonald v. Maddux, 11 Cal. 187; State v. St. Louis Co., 34 Mo. 546; Laramie Co. v. Albany Co., 92 U. S. 307; Chambers Co. v. Lee, 55 Ala. 534; State v. Williams, 29 La. Ann. 779; Currituck Co. v. Dare, 79 N. C. 505.

<sup>2</sup> In re House Bill No. 231 (Col.), 21 Pac. 472; Anderson v. Newman, 24 Neb. 40, S. C. 38 N. W. R. 40; Lewis v. Comanche Co., 35 Fed. R. 343; Lucas v. Tippecanoe Co., 44 Ind. 524; State v. Railroad, 3 How. U. S. 534; State v. Hamilton Co., 40 Kan. 323; Hempstead Co. v. Howard Co. (Ark.), 11 S. W. 478. A new county, it is held, takes none of the assets and assumes none of the liabilities of the old unless

the constitution or the statute so provides. Washington Co. v. Weld Co. (Col.), 20 Pac. 273; Reeves Co. v. Pecos Co., 69 Tex. 177, S. C. 7 S. W. R. 54. See, however, Gilliam v. Wasco Co., 14 Ore. 525.

<sup>3</sup> Mills v. Williams, 11 Iredell L. (N. C.) 558; Wilson v. Comm'rs, 7 W. & S. (Pa.) 197; Yarmouth v. Yarmouth, 56 Am. Dec. 666, and note; Comm'rs v. Sellev, 99 U. S. 624; Nash v. Eldorado County, 24 Fed. R. 252.

<sup>4</sup> People v. Power, 25 Ill. 187; Shawnee Co. v. Carter, 2 Kan. 115; Ray County v. Bentley, 49 Mo. 236.

<sup>5</sup> Montgomery County v. Miller, 82 Ind. 572; Blackford v. Shrader, 36 Ind.

Well reasoned cases hold that a county may maintain an action to prevent the seizure or destruction of the public roads or bridges within its territorial jurisdiction, except where townships or districts are charged with the duty of constructing and maintaining them.<sup>1</sup> This ruling rests on solid principle. In legal contemplation there are two separate and distinct estates in public roads, the easement of the public and the fee of the owner. The governmental corporation which represents the public must have a right to vindicate and protect the interest of the public, for the owner of the fee can not, on principle, do more than maintain his own estate and rights; he can not, certainly, prosecute an action to protect an estate vested in another, whether that other be the public or an individual citizen. The rights of the owner, however, are such as to enable him to resist the diversion of a public way to any other use.<sup>2</sup> The ownership of the easement is exclusively in the public for whom the governmental corporation is trustee, and as such trustee it is in duty bound to protect the rights of the beneficiary. Where the duty of constructing and maintaining highways is enjoined upon road districts or townships, then, as we suppose, they must prosecute the action necessary to prevent an injury or destruction of the easement vested in the public, but where the statute makes no provision upon the subject, and counties have a general charge of county affairs and property, the action may be prosecuted by the county within whose territory the road is situated.

The public corporation having charge and control of public ways, whether it be a *quasi* corporation, as a county, or a municipal corporation, as a city or an incorporated town, is not confined to an action for damages or to a suit for injunction, but it may successfully prosecute a strictly possessory action to vindicate and protect the title of the public to its easement. A corpo-

87; *Raymond v. Stearns*, 18 Minn. 60. A county may be sued for infringing a patent. *May v. Jackson*, 35 Fed. Rep. 710; *May v. Logan Co.*, 30 Fed. Rep. 250.

<sup>1</sup>*Lawrence County v. Chattaroi R. Co.*, 81 Ky. 225; *Hampshire v.*

*Franklin*, 16 Mass. 87; *Troy v. Cheshire*, etc., Co., 23 N. H. 83; *Hooksett v. Amoskeag, etc., Co.*, 44 N. H. 106

<sup>2</sup>*Hussner v. Brooklyn, etc., Co.*, 114 N. Y. 433; S. C. 21 N. E. R. 1002. See *Rights of Abutters*, *post*, Chap. XXVI.

ration of the classes designated has such a property right as will enable it to maintain an action of ejectment. There is, we know, some diversity of opinion upon this question, but the rule, as we have stated it, rests on principle and is strongly fortified by authority.<sup>1</sup> The owner of the fee may maintain ejectment against one who seizes his estate,<sup>2</sup> but his action is not to recover the public easement, for he can only recover the fee burdened with that easement. It seems to us that there is no technical objection to the rule we have stated even under the strict common law doctrine of ejectment, for the public corporation as the trustee of the public holds the legal title to the easement and the easement is real estate.

A county is, in all essential respects, a corporation, and is invested with the usual incidental powers of a corporation of its class, and the distinction made between a county and a city by many of the cases is not easily vindicated on principle. Judge Thompson says of the rule denying county liability: "Where, therefore, counties are erected into corporations, provided with a corporate fund, or the power of raising the same, and invested with the care of highways and bridges, the reason of the rule ceases, and the rule ought to fall with it; they should stand upon the same footing, in this regard, as chartered cities."<sup>3</sup>

<sup>1</sup> *City of Chicago v. Wright*, 69 Ill. 318; *Klinkener v. School Dist.*, 11 Pa. St. 444; *City of Apalachicola v. Land Co.*, 9 Fla. 340; *Inhabitants of Greenwich v. Easton*, 24 N. J. Eq. 217; *Barney v. Keokuk*, 94 U. S. 324; *Perry v. New Orleans*, 55 Ala. 413; *San Francisco v. Sullivan*, 50 Cal. 603; *Trustees v. Council of Hoboken*, 33 N. J. L. 13; *Dummer v. Jersey City*, 20 N. J. L. 86; *City of Winona v. Huff*, 11 Minn. 119; *Comm'rs of Bath v. Boyd*, 1 Iredell L. 194; *The Burrough v. Manko*, 39 N. J. L. 496; *Lewis v. San Antonio*, 7 Texas, 288; *City of Hannibal v. Draper*, 15 Mo. 634. The decision in the case of the *Terre Haute, etc., Co. v. Rodell*, 89 Ind. 128, S. C. 46 Am. R. 164, does not oppose the doctrine of the text, on the

contrary it quotes with approval the doctrine of *Peck v. Smith*, 1 Conn. 103, that there may be two estates in a street, one that of the owner of the fee, the other that of the owner of the public easement. But the doctrine of the text is opposed by *City v. Crottsenberg*, 61 Wis. 486, S. C. 50 Am. R. 149; *West Covington v. Freking*, 8 Bush. 121; *Grand Rapids v. Whittlesey*, 33 Mich. 109; *Comm'rs v. Taylor*, 1 Brev. S. C. 130; *Conner v. New Albany*, 1 Blackf. 88.

<sup>2</sup> *Goodtitle v. Alker*, 1 Burr. 133; *Cooper v. Smith*, 9 Sergt. & R. 26; *Bissell v. N. Y., etc., Co.*, 23 N. Y. 61; *Perry v. New Orleans, etc., Co.*, 55 Ala. 413, S. C. 28 Am. R. 740.

<sup>3</sup> Thompson on Negligence, 618.

It is no answer to this argument to say that counties are political subdivisions, for cities are political subdivisions and governmental instrumentalities as fully as counties are, and in this respect the keenest vision can discover no difference between the two classes of public corporations, and yet incorporated towns and cities are held liable for a breach of duty respecting highways.

The authorities, however, are very decidedly against the doctrine that counties may be held liable for a negligent breach of duty respecting highways, where there is no statute creating the liability. The current of opinion is, indeed, against the liability of the county for injuries from negligence resulting from any cause, although directly connected with county affairs,<sup>1</sup> yet, under like circumstances, a municipal corporation would be held liable in most jurisdictions. It is the doctrine of many of the cases that counties have no mandatory duties and are under no liabilities, except such as are created and imposed upon them by express statutory provisions.<sup>2</sup> In accord-

<sup>1</sup> *Manuel v. Cumberland Co.*, 98 N. C. 9; *Threadgill v. Anson Co.*, 99 N. C. 352; *Pfefferlee v. Lyon*, 39 Kans. 432; *Larkin v. Saginaw Co.*, 11 Mich. 88; *Hedges v. Madison Co.*, 6 Ill. 567; *Huffman v. San Joaquin Co.*, 21 Cal. 426; *Wehn v. Gage Co.*, 5 Neb. 494; *Treadwell v. Comm'rs*, 11 Ohio St. 190; *Swineford v. Franklin Co.*, 73 Mo. 279; *Reardon v. St. Louis Co.*, 36 Mo. 555; *Hannon v. St. Louis Co.*, 62 Mo. 313; *Crowell v. Sonoma Co.*, 25 Cal. 313. A county was held not liable for a defective sidewalk in *Clark v. Lincoln Co.* (Wash. Ter.), 20 Pac. R. 576, nor is it liable for injury caused by the fall of a dead tree standing near the road. *Watkins v. County Court*, 30 W. Va. 657, S. C. 5 S. E. R. 654.

<sup>2</sup> *Threadgill v. Anson Co.*, 99 N. C. 352, S. C. 6 S. E. R. 189; *Watson v. Preston Co.*, 30 W. Va. 657, S. C. 5 S. E. R. 654; *Kincaid v. Harden Co.*, 53 Ia. 430, S. C. 36 Am. R. 230; *Young v. Commissioners*, 2 Nott. & M. (S. Car.) 537; *Wood v. Tipton Co.*, 7 Baxter, 112; *Navasota v. Pearce*, 46 Tex. 525; *Mower v. Leicester*, 9 Mass. 247; *Cooley v. Freeholders*, 27 N. J. Law, 415; *King v. St. Landry*, 12 La. Ann. 858; *Tritz v. Kansas City*, 84 Mo. 632; *Covington Co. v. Kinney*, 45 Ala. 176; *Selma v. Perkins*, 68 Ala. 145; *Granger v. Pulaski Co.*, 26 Ark. 37; *Crowell v. Sonoma Co.*, 25 Cal. 313; *Ward v. Hartford*, 12 Conn. 404; *Scales v. Chattahoochee Co.*, 41 Ga. 225; *Symonds v. Clay Co.*, 71 Ill. 355; *Marion Co. v. Riggs*, 24 Kan. 255; *Dadsdall v. Olmstead Co.*, 30 Minn. 96; *Sutton v. Police Board*, 41 Miss. 236; *Lorillard v. Monroe Co.*, 11 N. Y. 392; *Wheatly v. Merser*, 9 Bush. 704; *Alamango v. Albany Co.*, 25 Hun. 551; *Treadwell v. Comm'rs*, 11 Ohio St. 190; *Browning v. City of Springfield*, 17 Ill. 143, S. C. 63 Am. Dec. 345; *Perry v. Worcester*, 66 Am. Dec. 431; *Savage v. Bangor*, 40 Me. 176, S. C. 63 Am. Dec. 658.



ance with the prevailing doctrine, it was held that a county is not liable for the negligence of a person engaged in work upon one of the highways owned by the county.<sup>1</sup> So, too, it has been held that a county is not liable for wrongfully closing a highway.<sup>2</sup> It follows from the principle declared by the decided cases that the liability of a county can not be inferred from the fact that a statute invests a county with authority to perform a designated duty and provides it with means to discharge the duty imposed upon it.<sup>3</sup>

Where a county is not charged with the duty of maintaining highways in a safe condition for travel, or is not provided with means for performing such a duty, there can be no liability, no matter which of the two conflicting views be adopted,<sup>4</sup> for the essential element of liability, even on the part of a municipal corporation, is, that the duty should be imposed by law, and the law should confer upon the corporation authority to secure means to enable it to perform that duty.

Statutes imposing a liability upon counties have generally received a very strict construction, and there is a manifest reluctance on the part of the courts to depart from the common law rule, notwithstanding the great difference between the powers and duties of American and English counties. In this respect the much lauded quality of the unwritten law to adapt itself to the changes wrought by progress has not found a very striking illustration. In accordance with the general disposition to strictly construe statutes creating a liability, it has been held that a county is not liable for negligence in operating a ferry used instead of a bridge, although the statute imposes upon it a liability for a negligent breach of duty respecting bridges.<sup>5</sup>

<sup>1</sup> *Fry v. County of Albermarle* (Va.), 9 S. E. R. 1004. But this doctrine has been denied. *Reardon v. St. Louis Co.*, 36 Mo. 555.

<sup>2</sup> *Turnpike Co. v. Davidson*, 14 Lea. Tenn. 73.

<sup>3</sup> In discussing the subject of bridges we have shown that the prevailing doctrine is opposed by many well reasoned cases and by many eminent text writ-

ers. *Ante*, Chapter III. The general doctrine was applied to a township in *Plymouth Tp. v. Graver*, 125 Pa. St. 24, S. C. 17 Atl. R. 249. See *Fowler v. Strawberry Hill*, 74 Ia. 644, S. C. 38 N. W. R. 321. See, also, *Com. v. Comm'rs* (Pa.), 17 Atl. R. 946.

<sup>4</sup> *Abbett v. Board*, 114 Ind. 61; *Board v. Bailey* (Ind.), 23 N. E. Rep. 672.

<sup>5</sup> *Arline v. Laurens Co.*, 77 Ga. 249.

Townships and road districts, as a general rule, possess much more limited authority than counties, and, with stronger reason than in the case of counties, it may be affirmed of them that they are not liable, in the absence of a statute, for a failure to maintain roads in a safe condition for travel. The general rule declared by the adjudged cases is that *quasi* corporations of this class are not liable unless expressly made so by statute.<sup>1</sup> There is some conflict upon the question whether a private action can be maintained against officers of the class of corporations under immediate mention, but the weight of authority is that a private action can not be maintained by an individual although he has suffered a special injury.<sup>2</sup> In a recent case,<sup>3</sup> the supreme court of Wisconsin held that a board of street commissioners of a city, who themselves undertook to construct a bridge, instead of letting the work to a contractor, were personally responsible to one who sustained an injury from the negligence of their employes. A distinction was drawn by the court between a case wherein officers were engaged in discharging a public duty, and a case where the officers undertook the ministerial work.

Where a public corporation is selected and employed as an agent of the State to perform a duty pertaining to purely State affairs, whether it be a city or a county, it can not be liable to private action. The reason for this is not far to seek. In discharging such a State duty, it stands in the place of the State as its instrument or agent.<sup>4</sup> To this extent the authorities are

<sup>1</sup> North Lebanon *v.* Arnold, 47 Pa. St. 488; Miller *v.* McWilliams, 50 Ala. 427; Waltham *v.* Kemper, 55 Ill. 346; Flori *v.* St. Louis, 69 Mo. 341; Yeager Tippecanoe Tp., 81 Ind. 46; Altnow *v.* Sibley, 30 Minn. 186; Niles *v.* Martin, 4 Mich. 557; Lane *v.* Woodbury, 58 Ia. 462; Bigelow *v.* Randolph, 14 Gray, 541.

<sup>2</sup> Hutson *v.* City, 5 Sandf. 289; Weet *v.* Trustees, 16 N. Y. 161; Hickcock *v.* Trustees, 16 N. Y. 161; Garlinghouse *v.* Jacobs, 29 N. Y. 303; Gould *v.* Booth, 66 N. Y. 62; Compare Smith *v.* Wright, 24 Barb. 170; Robinson *v.* Chamberlain, 34 N. Y. 389; Hover *v.* Barkhoof, 44 N. Y. 113; Adsit *v.* Brady, 4 Hill, 630; Babcock *v.* Gifford, 29 Hun. 186.

<sup>3</sup> Robinson *v.* Rohr, 73 Wis. 436, S. C. 9 Am. St. R. 810. In support of its ruling the court cited Wallace *v.* City of Menasha, 48 Wis. 79, S. C. 33 Am. R. 804; Uren *v.* Walsh, 57 Wis. 98; Peck *v.* Cooper, 112 Ill. 192, S. C. 54 Am. R. 231.

<sup>4</sup> Maximillian *v.* New York, 62 N. Y. 160; Benton *v.* City Hospital, 140 Mass. 13; Pruden *v.* Grant County, 12 Ore. 308; Walker *v.* Wasco County (Ore.), 19 Pac. R. 81.

harmonious, but there is a divergence when the question concerns purely local affairs, as roads and bridges, for a distinction is at this point made by many of the cases between municipal corporations and *quasi* corporations.<sup>1</sup>

The term, "municipal corporation" has been variously defined.<sup>2</sup> By some of the authorities a municipal corporation is said to be "A division of a State for governmental purposes," but this definition is too broad, since it includes counties and townships as well as cities and incorporated towns; other authorities define the term "municipal corporation" as "A political division of the State for the convenient administration of the government." Again, a municipal corporation is described as "an incorporated town." Judge Dillon says: "The primary and fundamental idea of a municipal corporation is an agency to regulate and administer the internal concerns of a defined locality in matters peculiar to the place incorporated, or at all events not common to the State or public at large."<sup>3</sup> It is evident that no one of these definitions or descriptions gives any feature that essentially distinguishes a county from a municipal corporation, and it is scarcely too much to say that none can be framed that will clearly or fairly exhibit a distinguishing feature; for all such public corporations agree in their essence, and that

<sup>1</sup> We have discussed the general question in Chapter III.

<sup>2</sup> *Kilgore v. Magee*, 8 Pa. St. 411; *New Orleans v. Clark*, 95 U. S. 644; *Van Riper v. Parsons*, 40 N. J. L. 4; *People v. Morris*, 13 Wend. 325; *People v. Hurlbut*, 24 Mich. 44; *Heller v. Stremmel*, 52 Mo. 509; *State v. Leffingwell*, 54 Mo. 458; *Norton v. Peck*, 3 Wis. 714. While the definitions given do not disclose a substantial difference between a county and a municipal corporation, it is evident from the practical effect of the many decisions that the courts have generally assumed that a municipal corporation is a more compact and perfect corporation than a county. Some of the decisions, seem, indeed, to lose sight of the fact that a municipal corporation is an instrumen-

tality of government, and treat it as they would a purely private corporation.

<sup>3</sup> *Dillon's Municipal Corp.* (3d ed.), section 21. The fundamental idea of a municipal corporation is, we venture to suggest, to supply the citizens of a locality with the means of exercising the right of local self-government. The legislature does not create the corporation, for that is composed of the citizens, and is beyond the creative power of the legislature. All that the legislature does, or can do, is to create a form of government; it can not, in a just sense, create the corporation. How far the legislature may go in restricting the inherent rights of free citizens who dwell in a town or city is a question of much interest and difficulty, but it is not within the scope of our work.

is that they are governmental subdivisions. All other matters of difference are merely accidental, or, at most, non-essential. The rule which exempts one class of governmental corporations from liability, and fastens it upon another where the statutes are the same as to the character of the duty and the means of performing it must be an arbitrary one, since it is quite impossible to find any difference sufficient to create a distinction.

We shall not, at this place, do more than say that the rule which prevails in most jurisdictions is that where a municipal corporation is charged with the duty and provided with the means of performing it, there is liability for negligence, although there is no statute creating a liability. It is unnecessary to do more than make this general statement, for the rule is referred to and illustrated in many other parts of our work.

"The legislature of the State," says Judge Dillon, "represents the public at large, and has full and paramount authority over all public ways and public places."<sup>1</sup> But the legislature, instead of exercising this authority directly, usually confers upon the local or municipal authorities the power to control and regulate the roads and streets within their jurisdiction.<sup>2</sup> The powers thus granted are generally very extensive, especially where cities are concerned. Just how far these powers extend, in any particular case, must be determined from the city charter or legislative enactment by which the authority is conferred.<sup>3</sup> It may be stated generally, however, that "the authority to open, care for, regulate, and improve streets, taken in connec-

<sup>1</sup>2 Dillon *Munic. Corp.*, section 656. See, also, *Portland, etc.*, R. R. Co. v. Portland, 14 Ore. 188.

<sup>2</sup>Barnes v. Dist. of Columbia, 91 U. S. 540; *Transportation Co. v. Chicago*, 99 U. S. 635; *Linton v. Ashbury*, 41 Cal. 525. It is often said that legislative power can not be delegated, and this expresses a general rule, but one so broken by exceptions that the exceptions are quite as important as the rule itself. It is now firmly established that governmental power may be delegated to local governmental instrumen-

talities. *State v. Yopp*, 97 N. C. 477, S. C. 2 Am. St. R. 305; *State v. Hoagland*, 51 N. J. L. 62, S. C. 16 Atl. R. 166; *Hennepin County v. Bartelson*, 37 Minn. 343, S. C. 34 N. W. R. 222; *James v. Pine Bluff*, 49 Ark. 199, S. C. 4 S. W. R. 760; *Com. v. Plaisted* (Mass.), 19 N. E. R. 224; *Stoutenburgh v. Hennick*, 129 U. S. 141, S. C. 5 R. R. & Corp. L. J. 291.

<sup>3</sup>*North Pacific, etc., Co. v. East Portland*, 14 Ore. 3; *Barter v. Com.*, 3 Pa. 253; *Commonwealth v. R. R. Co.*, 27 Pa. St. 339.

tion with the other powers usually granted, gives to municipal corporations all needed authority to keep the streets free from obstructions, and to prevent improper use, and to ordain ordinances to this end."<sup>1</sup> Thus, a general power granted to a city to lay out streets implies an authority to extend a street across a railroad.<sup>2</sup> So, power to lay out a highway or townway includes the power to lay out a footway.<sup>3</sup> Sidewalks may be improved under authority to improve streets.<sup>4</sup> General authority to construct or not to construct sidewalks on all streets not only authorizes their construction on streets where they do not exist, but also permits their removal where they already exist.<sup>5</sup> Power to "open and extend streets" includes the power to construct.<sup>6</sup> And power to regulate streets and sidewalks includes the power to determine their width.<sup>7</sup> Authority "to lay out, open, grade, and otherwise improve the streets and keep them in repair," empowers the city to establish the grade of streets and to require the owners of lots in constructing sidewalks to make them conform thereto, without petition from the property owners.<sup>8</sup> Under other special clauses in city charters, coupled with a "general welfare" clause, it has been held that cities have the power to regulate or prohibit auction sales<sup>9</sup> in the street, to prohibit fast driving,<sup>10</sup> to regulate the speed of

<sup>1</sup> 2 Dillon Munic. Corp., section 680, citing *Philadelphia v. R. R. Co.*, 58 Pa. St. 253; *Com. v. Brooks*, 99 Mass. 434; *Dudley v. Frankfort*, 12 B. Mon. (Ky.) 610, 617; *Linton v. Ashbury*, 41 Cal. 525; *R. R. Co. v. Chenoa*, 43 Ill. 209; *R. R. Co. v. Galena*, 40 Ill. 344; *Terre Haute v. Turner*, 36 Ind. 522. To same effect are *Janesville v. R. R. Co.*, 7 Wis. 484; *Commonwealth v. Elliott*, 121 Mass. 367; *Palmer v. Way*, 6 Col. 106; *Baker v. Normal*, 81 Ill. 108; *State v. Taylor*, 59 Md. 338; *Telegraph Co. v. Chicago*, 16 Fed. Rep. 309; *St. Paul v. Traeger*, 25 Minn. 248; *State v. Smith* (N. C.), 9 S. E. 434. In the case last cited an ordinance requiring citizens to work on streets was held valid.

<sup>2</sup> *St. Paul, etc., R. R. Co. v. Minne-*

*apolis*, 35 Minn. 141; *Hannibal v. R. R. Co.*, 49 Mo. 480; *Hannibal v. Winchell*, 54 Mo. 172.

<sup>3</sup> *Boston, etc., R. R. Co. v. Boston*, 140 Mass. 87.

<sup>4</sup> *Taber v. Grafmiller*, 109 Ind. 206.

<sup>5</sup> *Att'y General v. Boston*, 142 Mass. 200. See *Winter v. Montgomery*, 83 Ala. 589, 3 So. R. 235.

<sup>6</sup> *Sugar Co. v. Jersey City*, 26 N. J. Eq. 247.

<sup>7</sup> *State v. Morristown*, 33 N. J. L. 57.

<sup>8</sup> *Burr v. Town of New Castle*, 49 Ind. 322.

<sup>9</sup> *White v. Kent*, 11 Ohio St. 550; *Caldwell v. Alton*, 33 Ill. 416; *St. Paul v. Traeger*, 25 Minn. 248. And see *Graffy v. Rushville*, 107 Ind. 502.

<sup>10</sup> *Nealis v. Hayward*, 48 Ind. 19.

trains,<sup>1</sup> and, in short, to do almost anything proper and necessary to protect the public in the use of the streets.<sup>2</sup> And in a recent case in New York it was held that an awning erected over and upon a sidewalk, whether erected with or without permission of the city authorities, was a public nuisance which the authorities might abate.<sup>3</sup>

It sometimes happens that two different bodies attempt, at the same time, to exercise control over a street or road. Townships and counties generally have control of their own roads, and cities are usually given control of their own streets, yet laws are frequently enacted which, if taken literally, would permit the one to invade the jurisdiction of the other, and it is very difficult in such cases to determine just when that jurisdiction is intended by the legislature to be exclusive. The courts seem, however, to have favored that construction of the statutes which leaves to each jurisdiction the exclusive control of its own highways, and thus prevents a conflict of authority. Thus, it has recently been held by the supreme court of Illinois, that "statutes conferring, in general terms, upon commissioners of highways, authority to construct and maintain roads and bridges within their respective towns, will not be so construed as to authorize its exercise within the territorial limits of incorporated cities and villages in such towns."<sup>4</sup> Such, also, is the rule in Tennessee<sup>5</sup> and Texas;<sup>6</sup> and, in Indiana, it is settled law that the general statutes of the State, in relation to "public highways," do not apply to the streets and alleys of an incorporated town or city<sup>7</sup> and the county commissioners have no

<sup>1</sup>Grube v. Mo. Pac. R'y Co. (Mo.), 11 S. W. Rep. 736; Whitson v. City of Franklin, 34 Ind. 392; Richmond, etc., R. R. Co. v. Richmond, 96 U. S. 521; R. R. Co. v. Haggerty, 67 Ill. 113; Donnaher v. State, 8 Sm. & M. (Miss.) 649; R. R. Co. v. Buffalo, 5 Hill (N. Y.), 209; Knobloch v. R. R. Co., 31 Minn. 402.

<sup>2</sup>Shelton v. Mobile, 30 Ala. 540; Pedrick v. Bailey, 12 Gray, 161; Hawley v. Harrall, 19 Conn. 142; Com. v. Curtis, 9 Allen, 266; Nagle v. Augusta,

5 Ga. 546; Brooklyn v. Breslin, 57 N. Y. 591; Board v. Heister, 37 N. Y. 661; New Orleans, etc., Co. v. Hart, 40 La. Ann. 474, S. C. 8 Am. St. R. 544; Nixon v. Biloxi (Miss.), 5 So. Rep. 621.

<sup>3</sup>Farrell v. City of New York, 5 N. Y. Suppl. 672.

<sup>4</sup>People, ex rel. Seipp, v. Chicago, etc., Ry. Co., 118 Ill. 520, S. C. 8 N. E. R. 824.

<sup>5</sup>Cowan's Case, 1 Overt. 311.

<sup>6</sup>State v. Jones, 18 Tex. 874.

<sup>7</sup>Indianapolis v. Croas, 7 Ind. 9.

power or authority over city streets for any purpose without the consent of the city authorities.<sup>1</sup> The same general rule has been applied in New Jersey;<sup>2</sup> and, in Kentucky, it has been held that public roads and streets are separate and distinct, and a statute prescribing punishment for the erection of a purpresture on the one will not be extended to the other.<sup>3</sup> Similar rulings have been made under statutes regarding the performance of labor on roads and highways.<sup>4</sup>

On the other hand, it has been held that a county may, under a general statute authorizing it to lay out and establish roads and highways, establish a county road wholly within a city, or extend such road through the city, notwithstanding the city charter authorized the city to alter or extend highways within its limits.<sup>5</sup>

Cities usually have authority over the use of vehicles, and may, therefore, prescribe the routes to be followed by omnibuses,<sup>6</sup> and the stands to be occupied by hacks, express wagons, or other vehicles used for hire.<sup>7</sup> But a city can not authorize such

<sup>1</sup>Tucker v. Conrad, 103 Ind. 349.

<sup>2</sup>Cross v. Morristown, 18 N. J. Eq. 305; State v. Morristown, 33 N. J. L. 57. See State v. Town of Winter Park (Fla.), 5 S. R. 818, for a case in which there were rival claimants to corporate existence and powers. In this case it was said, "The object of such a corporation is the good government of the locality, and, obviously, that can not be attained where two separate corporations are exercising the same jurisdiction."

<sup>3</sup>Clark v. Com., 14 Bush. 166.

<sup>4</sup>O'Kane v. Treat, 25 Ill. 458; Fox v. Rockford, 38 Ill. 451; Ottawa v. Walker, 21 Ill. 605; *Ex parte Roberts* (Tex.), 11 S. W. R. 782. See Urban and Suburban Servitudes, Chapter XVII.

<sup>5</sup>Wells v. McLaughlin, 17 Ohio, 99; Baldwin v. Green, 10 Mo. 410, Norwich v. Story, 25 Conn. 44; Bennington v. Smith, 29 Vt. 254. But we are not disposed to assent to the doctrine

of these cases, although we quite agree that, as the legislature has plenary power over all highways, it may give two governmental corporations jurisdiction, but we are quite as well satisfied that the express grant of jurisdiction to one corporation excludes the other, and that this conclusion is correct in all cases except those in which the statute avoids it by express words or clear implication. We have discussed this subject at length in considering urban and suburban ways, as well as in considering the subject of bridges.

<sup>6</sup>Commonwealth v. Stodder, 2 Cush. 562.

<sup>7</sup>Commonwealth v. Mathews, 122 Mass. 60; See, also, Com. v. Robertson, 5 Cush. 438; Com. v. Brooks, 99 Mass. 434; City of St. Paul v. Smith, 27 Minn. 364; Veneman v. Jones, 118 Ind. 41; State v. Yopp, 97 N. C. 477, S. C. 2 Am. St. R. 305.

stands where they will interfere with the access to the premises of an abutting owner or otherwise deprive him of his rights as owner of the fee.<sup>1</sup> In pursuance of their authority over vehicles, they may require a license for wagons habitually used in the transportation of heavy loads,<sup>2</sup> or they may, perhaps, prescribe the width of tires.<sup>3</sup> A license or tax on all vehicles used for hire on the public streets may be enforced, although the owner of a vehicle so used lives outside the city limits.<sup>4</sup> But where it is evident that the tax is intended to be imposed only upon the habitual use of the vehicles, it will not be enforced as against a farmer or non-resident whose use is occasional only.<sup>5</sup> And where a city attempted to impose a license upon the use of all vehicles, without excepting such as could in no way be dangerous, annoying, or unusually destructive upon the streets, it was held to be a tax rather than a license, and not a valid exercise of the mere power to regulate.<sup>6</sup> The use of street cars may be regulated under authority to regulate omnibuses and vehicles in the nature thereof.<sup>7</sup> Bicycles<sup>8</sup> and sprinkling carts<sup>9</sup> are also vehicles, whose use may doubtless be regulated by the city authorities under a charter or law empowering them to regulate the use of vehicles.

The legislature may authorize a city to permit gas companies, water-works companies, and street railway companies to make

<sup>1</sup> *McCaffrey v. Smith*, 41 Hun. 117, *Branahan v. Hotel Co.*, 39 Ohio St. 333.

<sup>2</sup> *Brooklyn v. Breslin*, 57 N. Y. 591; *Gartside v. East St. Louis*, 43 Ill. 47; *Nagle v. Augusta*, 5 Ga. 546. And see *St. Louis v. Green*, 70 Mo. 562.

<sup>3</sup> *Regina v. Pipe*, 1 Ontario, 43; *People v. James*, 16 Hun. 426.

<sup>4</sup> *City Council v. Pepper*, 1 Rich. L. 364; *Memphis v. Battaille*, 8 Heisk. 524.

<sup>5</sup> *St. Charles v. Nolle*, 51 Mo. 122; *Adger v. Mayor*, 2 Spear. 719; *Bennett v. Birmingham*, 31 Pa. St. 15. And see *Garden City v. Abbott*, 34 Kan. 283; *Gass v. Greenville*, 4 Sneed, 62. See, also, as to the construction of ordinances providing for vehicle taxes, in par-

ticular cases. *Farwell v. Chicago*, 71 Ill. 269; *Knoxville v. Sanford*, 13 B. J. Lea, 545; *Joyce v. East St. Louis*, 77 Ill. 156; *Griffin v. Powell*, 64 Ga. 625; *Snell v. Belleville*, 30 U. C. Q. B. 81.

<sup>6</sup> *Brooklyn v. Nodine*, 26 Hun. 512; *Ex parte Gregory*, 20 Tex. App. 210.

<sup>7</sup> *Railway Co. v. Philadelphia*, 58 Pa. St. 119. See, also, *Allerton v. Chicago*, 9 Biss. 552, S. C. 6 Fed. R. 555.

<sup>8</sup> *Mercer v. Corbin*, 117 Ind. 450, S. C. 10 Am. St. R. 76; *State v. Collins* (R. I.), 17 Atl. Rep. 131; *In re Wright*, 29 Hun. 357; *Taylor v. Goodwin*, L. R. 4 Q. B. Div. 228; *State v. Yopp*, 97 N. C. 471, S. C. 2 Am. St. R. 305.

<sup>9</sup> *St. Louis v. Woodruff*, 71 Mo. 92.



use of its streets.<sup>1</sup> But a municipal corporation can not, at least under the powers usually granted by the legislature, give such a company the exclusive right to make use of its streets and thus create a monopoly.<sup>2</sup> The legislature may also authorize the use of streets by railroads and telegraph companies.<sup>3</sup> Whether this can be done without compensation to the adjoining land owners is, however, a disputed question.<sup>4</sup> Country roads can not, it seems, be used for any of these purposes without such compensation.<sup>5</sup>

Where general authority over streets and alleys is conferred upon a municipal corporation, and there is no statute expressly or by clear implication authorizing their use for the purpose of operating a railroad or for the purpose of digging trenches and laying pipe lines, the streets and alleys can not be used for such purpose without the consent of the municipal authorities.<sup>6</sup> In

<sup>1</sup> *Quincy v. Bull*, 106 Ill. 337, S. C. 4 Am. & Eng. Corp. Cas. 554; *Garrison v. Chicago*, 7 Biss. 480; *Brown v. Duplessis*, 14 La. Ann. 842; *Smith v. Metropolitan, etc., Co.*, 12 How. Pr. (N. Y.) 187; *City of Indianapolis v. Gas, etc., Co.*, 66 Ind. 396.

<sup>2</sup> *Citizens' G. & M. Co. v. Elwood*, 114 Ind. 332, S. C. 20 Am. & Eng. Corp. Cas. 263; *State v. Cincinnati, etc., Co.*, 18 Ohio St. 293; *Norwich v. Norwich, etc., Co.*, 25 Conn. 19; *State v. Milwaukee, etc., Co.*, 29 Wis. 454; *Crescent G. Co. v. New Orleans, etc., Co.*, 27 La. Ann. 148; *Des Moines, etc., Co. v. Des Moines*, 44 Ia. 505; *Memphis, etc., Co. v. Williamson*, 9 Heisk. (Tenn.) 314; *Grand Rapids, etc., Co. v. Grand Rapids, etc., Co.*, 20 Am. & Eng. Corp. Cas. 270; *Brenham v. Brenham Water Works Co.*, 67 Tex. 543, S. C. 20 Am. & Eng. Corp. Cas. 207; *Richmond, etc. Co. v. Middletown*, 59 N. Y. 231; *Davenport v. Kleinsmidt (Mont.)*, 16 Am. & Eng. Corp. Cas. 301; *R. R. Co. v. Transit Ry.*, 24 Fed. Rep. 306. See 41 Albany L. J. 104.

<sup>3</sup> *Johnson v. Thompson-Houston*

*Electric Co.*, 7 N. Y. Sup. 716; *R. R. Co. v. Garside*, 10 Kan. 552; *R. R. Co. v. Brown*, 17 B. Mon. (Ky.) 763; *Moses v. R. R. Co.*, 21 Ill. 516; *Commonwealth Co. v. Boston*, 97 Mass. 555; *Telegraph Co. v. Chicago*, 16 Fed. Rep. 309, S. C. 11 Biss. 539; *City v. Telegraph Co.*, 11 Phila. 327.

<sup>4</sup> See *post*, Chapter XXVI, where the question is fully considered.

<sup>5</sup> *Bloomfield, etc., Co. v. Calkins*, 62 N. Y. 386; *Sterling's Appeal*, 111 Pa. St. 35, S. C. 2 Atl. Rep. 105; *Galbreath v. Armour*, 4 Bell App. Cas. 374.

<sup>6</sup> *Com. v. Central Passenger R. R.*, 52 Pa. St. 506; *Jersey City, etc., Co. v. Consumers, etc., Co.*, 4 Cent. R. 330; *Appeal of Penna. R. R. Co.*, 115 Pa. St. 514; *St. Louis, etc., Co. v. St. Louis*, 92 Mo. 160; *Chicago, etc., Co. v. Chicago*, 121 Ill. 176, S. C. 11 N. E. R. 907; *Atchison, etc., Co. v. Garside*, 10 Kan. 552; *Lexington v. Applegate*, 8 Dana, 289; *Indiana, etc., Co. v. Hartley*, 67 Ill. 439; *Citizens', etc., Co. v. Town of Elwood*, 114 Ind. 332; *Brooklyn, etc., Co. v. Brooklyn*, 78 N. Y. 524; *James River Co. v. Anderson*, 12 Leigh. 278.

other words, the authority to license persons or corporations to use the public ways of the city is in the municipal officers, and the streets and alleys can not be used except by their leave, unless the legislature has clearly taken the authority from them. The legislature may directly exercise the power, but unless it does thus exercise it, the municipal government to which the general authority over streets and alleys is granted possesses it.<sup>1</sup> There must be legislative authority to authorize the use of public roads or streets for railroad purposes, but this authority<sup>2</sup> may be inferred from the provisions of the charter or act of incorporation.<sup>3</sup> It is within the power of a municipal corporation to which the exclusive control of streets and alleys is granted to impose conditions upon railroad companies which it licenses to use its streets, provided such conditions are not contrary to the law, or in violation of the chartered rights of the railroad company. Within the limit indicated, the municipality has a wide discretion in determining what conditions shall be imposed upon its licensees.<sup>4</sup> While it is true, as we have said, that the legislature instead of delegating to a municipal corporation the power to grant the use of the streets to a railroad company may itself exercise that power, yet where the power is clearly delegated in an act of incorporation to municipal corporations general words in an act incorporating railroad companies will not be construed to confer a right to occupy the streets of a city without the consent of its officers. A general grant of authority to construct a railroad from one point to another does not necessarily carry the right to use municipal streets without the license of the local authorities.<sup>5</sup>

<sup>1</sup> *Savannah, etc., Co. v. Savannah*, 45 Ga. 602; *Hine v. Keokuk, etc., Co.*, 42 Ia. 636.

<sup>2</sup> *Stanley v. Davenport*, 54 Ia. 463, S. C. 37 Am. R. 463; *Milburn v. Cedar Rapids, etc., Co.*, 12 Ia. 246; *Protzman v. Indianapolis, etc., Co.*, 9 Ind. 468; *Memphis, etc., Co. v. Memphis*, 4 Cold. 406; *Hussner v. Brooklyn, etc., R. R. Co.*, 114 N. Y. 433, S. C. 21 N. E. R. 1002.

<sup>3</sup> *Denver, etc., Co. v. Dumbke (Col.)*,

17 Pac. 777; *St. Paul, etc., Co. v. Minneapolis*, 35 Minn. 141, S. C. 27 N. W. R. 500.

<sup>4</sup> *St. Louis, etc., Co. v. Copps*, 72 Ill. 188, *Pacific R. R. Co. v. Leavenworth*, 1 Dillon C. C. R. 393; *Harlem R. R. Co. v. New York*, 1 Hill (N. Y. C. P.), 562. It may even require railway companies to water their tracks so as to lay the dust. *City, etc., R'y Co. v. Mayor*, 77 Ga. 731, S. C. 4 Am. St. Rep. 106.

<sup>5</sup> *Chicago, etc., v. Chicago*, 121 Ill.

Where a municipal corporation has authority to license the use of its streets by railroad companies, or other like companies, it does not become liable if there is nothing more than an exercise of the power by the grant of a license,<sup>1</sup> but it may be liable where there is an unauthorized exercise of power, or where there is a negligent breach of duty respecting the care and maintenance of the streets.

We have already suggested that there is a radical difference between the rights of the public and the citizens having a general right of passage and the rights of an abutter, and what we have said at this place has no reference to the rights of abutters, but is to be considered as applying only to the municipal corporation, its citizens and the public.

The grant of a right to use a street does not, by any means, imply that the municipality surrenders the right to make needful police regulations, nor does it authorize the company to unnecessarily obstruct the street or to negligently operate its road. The right to make necessary rules for the safety of the public is a legislative power, and is not surrendered, if, indeed, it can be capable of surrender. Nor does the grant of permission to use a highway authorize the railroad company to unnecessarily or unreasonably interfere with the public while laying down or repairing its track.<sup>2</sup>

One of the most important powers granted to the authorities having control over streets is the power to grade and improve them. "That the use of the streets for travel may be made safe and convenient," says Judge Dillon, "the legislature usually confers upon the municipal authorities the power, in express terms, to graduate and improve them, and supplies the means to carry the power into effect by requiring the inhabitants to perform labor upon the streets or to pay specific taxes for that purpose, or taxes that may be so appropriated by the corpora-

176. S. C. 11 N. E. R. 907; Pennsylvania Co. v. Schuylkill, etc., Co., 116 Pa. St. 55, S. C. 8 Atl. R. 914; Clinton v. Railroad Co., 24 Ia. 455; Springfield v. Railroad Co., 4 Cush. 63; Ruttle v. Covington (Ky.), 10 S. W. R. 644.

<sup>1</sup> Indiana, etc., Co. v. Eberle, 110 Ind.

<sup>2</sup> Dallas, etc., Co. v. Able (Tex.), 9 S. W. R. 871; Kyne v. Wilmington, etc., Co. (Del.), 14 Atl. R. 922; State v. Chicago, etc., Co. (La.), 6 S. R. 217; Atchison, etc., Co. v. Miller, 39 Kan. 419.

tion."<sup>1</sup> This power is a continuing one, and is not exhausted by being once exercised.<sup>2</sup> The exercise of the power rests largely in the discretion of the municipal authorities, and they, and not the courts, must judge of the necessity or expediency thereof.<sup>3</sup> But the authority must be exercised in the manner prescribed by statute.<sup>4</sup> The corporation can not, ordinarily at least, bind itself not to change the grade of its streets,<sup>5</sup> but the legislature may, it has been held, authorize it to surrender the power so to do.<sup>6</sup>

The power to pave includes the power to grade, and, like the latter, is not exhausted by being once exercised.<sup>7</sup> Under this power, the pavement "is not limited to uniformly arranged masses of solid material, or blocks of wood, brick or stone, but it may be as well formed of pebbles, or gravel, or other hard substances which will make a compact, even hard way or floor."<sup>8</sup> Everything necessary to carry the power into effect is

<sup>1</sup> 2 Dillon Munic. Corp., section 685.

<sup>2</sup> McCormick v. Patchen, 53 Mo. 33, S. C. 14 Am. Rep. 440; Morley v. Carpenter, 22 Mo. App. 640; Estes v. Owen, 90 Mo. 113; Farrar v. St. Louis, 80 Mo. 392; Goszler v. Georgetown, 6 Wheat. 507; Municipality v. Dunn, 10 La. Ann. 57; Coates v. Dubuque, 68 Ia. 550; City of Kokomo v. Mahan, 100 Ind. 242. These authorities also hold that power to pave is continuing; but compare Hammett v. Philadelphia, 65 Pa. St. 146, S. C. 3 Am. Rep. 615; Wistar v. Philadelphia, 80 Pa. St. 505, S. C. 21 Am. Rep. 112.

<sup>3</sup> Smith v. Washington, 20 How. (U. S.) 135; Murphy v. Peoria, 119 Ill. 509; Irving v. Ford (Mich.), 32 N. W. Rep. 601; New Haven v. Sargent, 38 Conn. 50, S. C. 9 Am. Rep. 360; City of Delphi v. Evans, 36 Ind. 90, S. C. 10 Am. Rep. 12; Macy v. Indianapolis, 17 Ind. 267; McCormick v. Patchen, 53 Mo. 33, S. C. 14 Am. Rep. 440; Karst v. St. Paul, etc., Co., 22 Minn. 118; Markham v. Mayor, 23 Ga. 402.

<sup>4</sup> N. Y. Nat. Water Works Co. v.

Kansas City, 20 Mo. App. 237; Thompson v. Boonville, 61 Mo. 282; Hawthorne v. East Portland, 13 Ore. 271; Henderson v. Baltimore, 8 Md. 352.

<sup>5</sup> Kreigh v. Chicago, 86 Ill. 407.

<sup>6</sup> N. Y. Nat. Water Works Co. v. Kansas City, 20 Mo. App. 237. But as the power to make and maintain highways is a sovereign prerogative, there is, at least, fair reason for doubting whether there can be such a surrender. Ordinarily legislative powers can not be surrendered, and there may be a question whether the right to control a highway can be yielded for the benefit of any person either artificial or natural.

<sup>7</sup> State v. Elizabeth, 30 N. J. L. 365; Williams v. Detroit, 2 Mich. 560; *In re Belmont*, 12 Hun. 558; Morely v. Carpenter, 22 Mo. App. 640. A petition from the property owners is, however, required before the power to repave can be exercised in some of the States. *In re Garvey*, 77 N. Y. 523.

<sup>8</sup> Burnham v. Chicago, 24 Ill. 496.

To same effect, *Gurnee v. Chicago*, 40

also included, such as the right to provide gutters, curbstones, trimmings and the like.<sup>1</sup> The right to pave cross-walks, street intersections, and the like, falls equally within the authority to pave,<sup>2</sup> and is not restricted by the fact that a railroad runs along the street.<sup>3</sup> But power to repair does not, at least in ordinary cases, include the power to pave in the first instance.<sup>4</sup>

The general rule is well established that a municipal corporation is not liable for consequential damages necessarily caused in grading a street, unless the corporation is made liable by the constitution, or by some provision in its charter or the statutes of the State.<sup>5</sup> This seems to be the law in almost every State except Ohio.<sup>6</sup> As said by the supreme court of Wisconsin,<sup>7</sup> there is "much justice and equity" in the doctrine of the Ohio cases, but they are not authority beyond the State of Ohio. Damages caused by the negligence of the city in performing the work are not consequential, and compensation therefor may be recovered in proper cases.<sup>8</sup> So, there are now

Ill. 165; *Warren v. Henly*, 31 Ia. 31; *In re Phillips*, 60 N. Y. 16.

<sup>1</sup> *Schenley v. Com.*, 36 Pa. St. 29; *McNamara v. Estes*, 22 Ia. 246; *Steckert v. East Saginaw*, 22 Mich. 104; *People v. Brooklyn*, 21 Barb. 484; *Dean v. Borchemies*, 30 Wis. 236.

<sup>2</sup> *Powell v. St. Joseph*, 31 Mo. 347; *In re Burke*, 62 N. Y. 224; *Lawrence v. Killam*, 11 Kan. 499; *O'Leary v. Sloo*, 7 La. Ann. 25.

<sup>3</sup> *State v. Atlantic City*, 34 N. J. L. 99; *State v. Jersey City*, 28 N. J. L. 500; *Watson v. Passaic*, 46 N. J. L. 124.

"Repair means to restore to sound or good condition, after injury or partial destruction." *Pittsburgh, etc., Ry. Co. v. Pittsburgh*, 80 Pa. St. 72; *Weaver v. Templin*, 113 Ind. 298, 303. See, also, *In re Fulton Street*, 29 How. Pr. 429; *People v. Brooklyn*, 21 Barb. 484. But we suppose that the power to improve may be inferred, although not conferred in express terms.

<sup>5</sup> *Callender v. Marsh*, 1 Pick. (Mass.) 418; *Snyder v. President*, 6 Ind. 237;

*Cummins v. Seymour*, 79 Ind. 491, S. C. 41 Am. Rep. 618; *Henderson v. Minneapolis*, 6 Am. & Eng. Corp. Cas. 4; *Goszler v. Georgetown*, 6 Wheat. 593; *Governor, etc., v. Meredith*, 4 T. R. 794; *Simmons v. Camden*, 26 Ark. 276, S. C. 7 Am. Rep. 620; *Quincy v. Jones*, 76 Ill. 231, S. C. 20 Am. Rep. 243. And see authorities cited in note to *Radcliff's Exrs. v. Mayor*, 53 Am. Dec. 366, in note to *Keppeler v. Keokuk*, 2 Am. & Eng. Corp. Cas. 447, and in 6 Am. & Eng. Ency. of Law, 548. See *Urban and Suburban Servitudes*, Chapter XVIII.

<sup>6</sup> *Crawford v. Delaware*, 7 Ohio St. 459; *Akron v. Chamberlain Co.*, 34 Ohio St. 328, S. C. 32 Am. Rep. 367. See, also, *Louisville v. Rolling Mill Co.*, 3 Bush. (Ky.) 416; *Eaton v. Railroad Co.*, 51 N. H. 504, 529.

<sup>7</sup> *Alexander v. Milwaukee*, 16 Wis. 247, 256. See, also, remarks of *Bronson, C. J.*, in *Radcliff's Exrs. v. Mayor*, 4 N. Y. 195, 205.

<sup>8</sup> *Hendershott v. Ottumwa*, 46 Ia. 658,

legislative enactments in many of the States giving the right to recover consequential damages for changes in the grade of a street.<sup>1</sup>

S. C. 26 Am. Rep. 182; *Dorman v. Rep.* 325; *McCarthy v. St. Paul*, 22 Jacksonville, 13 Fla. 538, S. C. 7 Am. Minn 527; *Columbus v. Woolen Mills*, Rep. 253, and note. 33 Ind. 435; *Burr v. Leicester*, 121

<sup>1</sup> See *Harmon v. Omaha*, 17 Neb. 548, Mass. 241, and authorities cited in note S. C. 52 Am. Rep. 420; *City of Elgin to Healey v. New Haven*, 2 Am. & *v. Eaton*, 83 Ill. 535, S. C. 25 Am. Rep. Eng. Corp. Cas. 450, 456. 412; *Reardon v. San Francisco*, 6 Pac.

## CHAPTER XX.

### IMPROVEMENTS AND REPAIRS.

The question whether a road or street shall be improved or repaired is generally committed to the local authorities for decision, and, under the principle to which we have so often referred, their decision can not, as a general rule, be controlled by the courts.<sup>1</sup> The duty is one, however, that must be performed whenever it is necessary to make a way reasonably safe for travel, which the local authorities have thrown open for use. While municipal corporations are not always bound to improve or repair, they are bound to do so whenever a failure would endanger the safety of persons whom they have directly or impliedly invited to use the way for travel.<sup>2</sup> In the case of a municipal corporation, the failure to repair or improve, where the failure is negligent or wrongful and endangers the safety of the persons having a right to travel the way, creates a liability, because having the means to improve or repair, and having the power to repair and improve, its liability is commensurate with its means and its power. In such case the duty is inferred, and as the duty and the power exist, the negligent failure to perform the duty is actionable.

The general rule is that no public corporation is liable to a private action for a mere failure to undertake the work of improving or repairing a road or street.<sup>3</sup> It becomes liable, as a gen-

<sup>1</sup>Benson *v.* Waukesha (Wis.), 41 N. W. R. 1017.

<sup>2</sup>Treise *v.* St. Paul, 36 Minn. 526. If the street is adopted by the municipal corporation, it is liable no matter by whom it was laid out. Klein *v.* Dallas, 71 Tex. 280, S. C. 8 S. W. R. 90. Where a city deposits soil upon the prolongation of a street so as to

make it appear a part of the street, it is under a duty to make it safe. Ray *v.* St. Paul (Minn.), 42 N. W. 297.

<sup>3</sup>Lynch *v.* Mayor, 76 N. Y. 60; Hughes *v.* Baltimore, Taney, C. C. 243; Williams *v.* Grand Rapids (Mich.), 33 Alb. L. J. 237; Henderson *v.* Sandefur, 11 Bush. (Ky.) 550; Lyon *v.* Cambridge, 136 Mass. 419; Freeport *v.*

eral rule, only in the event that the citizen sustains a special injury caused by a negligent or wrongful breach of an imperative duty. It is upon the ground that a special injury is sustained by one who falls into an excavation negligently suffered to remain unguarded in a street, or falls over an obstruction unlawfully in the highway, that he is held to have a right of action for damages. As long as the road or street is reasonably safe for passage no citizen can maintain an action against the corporation for a mere failure to undertake the work of improving or repairing. This is no more than a just application of the familiar rule that a public right can not be vindicated by a private action.

Some of the courts, pressing the principle that a municipal corporation is not liable for a failure to undertake the work of repairing or improving a road or street to an unreasonable extent, have held that the adoption of an insufficient or improper plan will not render it liable in a private action, but this as we believe, and as we have elsewhere undertaken to show, is not sound doctrine.<sup>1</sup> It is true, that as long as it is a mere question of judgment or discretion there can be no liability, but where special injury accrues to the citizen and the element of negligence becomes an influential one, then liability attaches to the breach of duty. This is true where the act of the corporation makes it unsafe to use the public way without improving or repairing it. For illustration, if an intersecting street should be so cut down as to make an abrupt descent, the corporation would surely be under a duty to improve the cross street or to guard the descent so that no one would undertake to cross it. A further illustration of the principle is supplied by the cases which hold that where the system of drainage adopted makes an outlet necessary for the protection of private property, it is the duty of the corporation to provide a suitable outlet.<sup>2</sup> An-

Isbell, 83 Ill. 440; *Wilson v. New York* 1 Denio, 595; *Stackhouse v. City of Lafayette*, 26 Ind. 17. The failure to repair a street gives no right of action to the occupant of abutting property. *Gold v. Philadelphia*, 115 Pa. St. 184.

<sup>1</sup> *Post*, Chapter XXI.

<sup>2</sup> *City of Evansville v. Decker*, 84 Ind. 325; *Smith v. City of Alexandria*, 33 Gratt. 208, S. C. 36 Am. Rep. 788; *Ross v. City of Clinton*, 46 Ia. 606, S. C. 26 Am. R. 169.



other illustration is supplied by the decisions which declare that where water is collected in a body, the corporation will be liable to one upon whose land it pours the collected water, although it would not be liable for consequential damages resulting from an improvement made with reasonable care and skill,<sup>1</sup> and this conclusion results from the principle that the municipal corporation having created a necessity for an improvement must make such an improvement as its act has rendered necessary. It is evident, therefore, that there may be cases in which a special injury may be sustained by a citizen from a failure to improve or repair a street, and whenever this is so he has a right of action. But ordinarily, there is no right of action for a failure to undertake the work of improving or repairing a road or street, since the question whether a particular improvement shall or shall not be undertaken is generally a matter of judgment, and no mere error of judgment, where there is a right to exercise a discretion, will supply the foundation for a private right of action.

Where a specific duty is imperatively enjoined upon a municipal corporation, and it has the means and the power to perform the duty, then it would undoubtedly be liable to one who, without fault on his part, has sustained a special injury because of the wrongful failure to discharge the duty positively enjoined by the statute.<sup>2</sup> Such a duty becomes absolute, and the local authorities are deprived of all discretionary authority. Its performance may, in the proper case, be coerced by mandamus. It is very seldom, however, that the statute makes the duty imperative, for, in by far the greater number of cases, the matter of improving highways is committed to the discretion of the local authorities. Statutes granting authority to improve, and providing means for paying the cost of the improvement, are not considered as mandatory, in such a sense, at least, as to deprive the highway officers of discretionary power. Thus the

<sup>1</sup> *Davis v. City of Crawfordsville*, 119 Ind. 1; *O'Brien v. City of St. Paul*, 25 Minn. 333, S. C. 33 Am. R. 470; *Gillson v. City of Charleston*, 16 W. Va. 282, S. C. 37 Am. R. 763; *Inhabitants of West Orange v. Field*, 37 N. J. Eq. 600, S. C. 45 Am. R. 670; *Noonan v. City of Albany*, 79 N. Y. 470, S. C. 35 Am. R. 540.

<sup>2</sup> *Wilkins v. Rutland (Vt.)*, 17 Atl. R. 735.

grant of authority to construct and repair sidewalks and assess the expense against the abutters does not create an imperative duty.<sup>1</sup> So a grant of authority to remove all obstructions in a harbor does not impose upon the local officers a duty that they are imperatively bound to perform.<sup>2</sup> Nor does a grant of authority to "construct sewers," deprive the local officers of discretionary powers, and impose upon them a duty that can be coerced by mandamus, or which will constitute the foundation for a private action for damages.<sup>3</sup> The rule deducible from the adjudged cases is, that the grant of authority to make an improvement, unaccompanied by mandatory words commanding it to be made, vests in the highway officers a discretionary power, and no action will lie for a mere failure or refusal to exercise this power.<sup>4</sup> There are many evils that the judiciary can not remedy or redress, and among them is that arising out of the failure of highway officers to wisely exercise their authority.

The grant of authority to improve a road or street carries with it such incidental powers as are necessary to a proper exercise of the principal power granted, and it is the fault of the local officers, upon whom the power is conferred, if they do not employ such means and measures as ordinary care and skill require to make and maintain the improved way reasonably safe for passage, since they have authority to do this as an incident of the principal power conferred upon them. The grant of au-

<sup>1</sup> *Saulsbury v. Ithaca*, 94 N. Y. 27; *Hines v. Lockport*, 50 N. Y. 236; *Vogel v. New York*, 92 N. Y. 10; *Carroll v. St. Louis*, 4 Mo. App. 191; *Wilson v. Halifax*, L. R. 3 Exch. 114.

<sup>2</sup> *Goodrich v. Chicago*, 20 Ill. 445; *Forbes v. Lee, etc., Board*, L. R. 4 Exch. Div. 116.

<sup>3</sup> *Anne Arundel Co. v. Duckett*, 20 Md. 468; *Wilson v. New York*, 1 Denio, 595; *Bennett v. New Orleans*, 14 La. Ann. 120; *Steinmyer v. St. Louis*, 3 Mo. App. 256.

<sup>4</sup> *Bannagan v. District of Columbia*, 2 Mackey, 285; *Alton v. Hope*, 68 Ill. 167; *Atchison v. Challiss*, 9 Kan. 603;

*McGregor v. Boyle*, 34 Ia. 268; *Van Pelt v. Davenport*, 42 Ia. 308; *Judge v. Meriden*, 38 Conn. 90; *Aaron v. Broiles*, 64 Tex. 316; *Schattner v. Kansas*, 53 Mo. 162; *Randall v. Eastern R. Co.*, 106 Mass. 276; *Tinker v. Russell*, 14 Pick. 279; *Glossom v. Herton Local Board*, 12 Ch. Div. 102; *Carr v. Northern Liberties*, 35 Pa. St. 324; *Grant v. Erie*, 69 Pa. St. 420; *Easton v. Neff*, 102 Pa. St. 474; *Hughes v. Baltimore*, Taney's Dec. 243; *McDonough v. Virginia City*, 6 Nev. 90; *Lindholm v. St. Paul*, 19 Minn. 245; *Henderson v. Sandefur*, 11 Bush. 550.

thority carries with it a corresponding obligation, and imposes upon the officers, who undertake to exercise the power by performing the ministerial work of making the improvement, the duty of using ordinary care and skill in performing the work. Outside of the New England States, and those States which follow the New England rule, the doctrine is that there is a liability for a failure to exercise ordinary care and skill in making the improvement, for once the ministerial act is undertaken, such reasonable care and skill must be exercised as will not only make the highway safe for passage, but will prevent injury to adjoining property. The basis of all actions against municipal corporations for special injuries sustained by adjoining owners from the negligent and unskillful improvement of a street is negligence, and where there is no negligence there is no liability except in cases where there is a statute expressly creating it. It must appear, in order to charge the public corporation, that there was a duty, and that the duty was wrongfully omitted or was so negligently performed as to cause a special injury to the plaintiff. The principle which rules is that corporations are only liable where they have negligently omitted a duty or have negligently performed it.<sup>1</sup>

It is the right of those to whom the authority is delegated to determine not only when, but in what manner, the improvement shall be made, except, of course, where the statute specifically designates the improvements and prescribes the mode of making them, and no citizen can compel the highway officers to undertake the work or to pursue a particular course. No citizen can successfully question the proceedings, however injudicious they may be, if the local authorities keep within the scope of the statute, and are not guilty of such negligence as causes a special actionable injury to the complainant.<sup>2</sup> Where the im-

<sup>1</sup>Cracknell *v.* Thetford, Mayor of, etc., L. R. 38 L. J. C. P. 353; Hodgson *v.* York, 28 L. T. N. S. 386; Gibson *v.* Preston, 5 Q. B. 222; Blakemore *v.* Vestry, etc., 51 L. J. Q. B. 496. They are liable only for the injury resulting from their negligence, not for injuries resulting from the public work. White-

house *v.* Tellow, 10 C. B. N. S. 765; Dixon *v.* Metropolitan Board of Public Works, 7 Q. B. D. 418; Ruck *v.* Williams, 3 H. & N. 308.

<sup>2</sup>Pepper *v.* City, 114 Penna. St. 96; O'Reilly *v.* Kingston, 114 N. Y. 439, S. C. 21 N. E. R. 1004.

provement is to be paid for out of the public treasury, the corporate authorities may cause it to be done by their own agents and employes, and need not let it out to independent contractors unless the statute requires that the work shall be done by contractors and not by the public corporation.<sup>1</sup> Where, however, the statute requires the work to be awarded to the lowest or to the best bidder, then the highway officers must not undertake the work themselves, but must award it to the successful competing bidder as the statute directs.<sup>2</sup> The fact that a contract must be let in cases where the cost of the improvement is to be assessed against property owners does not, of itself, preclude the highway officers from doing the work by their own employes in cases where the cost is to be paid from the public or corporate treasury.<sup>3</sup> If the statute does not provide how the work shall be prosecuted, then it is within the discretion of the local authorities to do the work through their own employes or to let it out by contract. It is, of course, essential that there should be no fraud or unfair favoritism in awarding contracts, for here, as elsewhere in the law of contracts, fraud will vitiate everything.<sup>4</sup>

Where the expense of an improvement is to be paid from the public or corporate treasury, the rules of law as to the mode of procedure, as well as to the work that may be done, are not so strict as in cases where it is to be paid by assessments levied upon private property. Many improvements may be made under general clauses, such, for instance, as what is often called the "general welfare clause," where the cost is to be paid from the general treasury, that could not be made at the expense of adjacent or adjoining property owners.<sup>5</sup> The reason for this is obvious: the right to levy a special assessment is purely statutory and in derogation of common right, whereas, mak-

<sup>1</sup> *Platter v. City of Seymour*, 86 Ind. 323; *Cummins v. City of Seymour*, 79 Ind. 491, S. C. 41 Am. R. 618; *City of Aurora v. Fox*, 78 Ind. 1.

<sup>2</sup> *Reilly v. City of New York*, 18 N. E. R. 623; *Petition of Manhattan, etc.*, Co., 102 N. Y. 301; *Mappa v. City*, 61

Cal. 309; *Beers v. Dalles City*, 16 Ore. 334, S. C. 18 Pac. R. 385.

<sup>3</sup> *City of Aurora v. Fox*, 78 Ind. 1; *Cummins v. City of Seymour*, 79 Ind. 491.

<sup>4</sup> *Brady v. Bartlett*, 56 Cal. 350.

<sup>5</sup> *Rushville Gas Co. v. City of Rushville* (Ind.), 23 N. E. R. 72.

ing public improvements demanded by the public good and to be paid for out of the public treasury is the exercise of a corporate function that may well be implied from the general words of the act of incorporation. It is necessary, to be sure, that the particular improvement should be one within the scope of the authority delegated and not foreign to the purpose for which the municipal corporation was created, but it is by no means necessary that the particular improvement should always be authorized by express words. The corporate control over public funds is much more extensive than the authority over private property, or the right to levy special assessments, but, while this is true, it is also true that the highway officers can do no valid act beyond the scope of the authority conferred upon them. Within the scope of their authority they have, however, a wide discretion and may prosecute works at the corporate expense when they deem them necessary for the public good, provided, of course, that the works they undertake are such as are legitimately connected with the purposes for which the corporation was organized. Where the work is to be paid for from the general treasury and not by special assessments, contracts may be divided as seems to the highway officers, in the fair exercise of a reasonable discretion, most expedient, and, this, indeed, may be often done where the improvement is to be paid for by an assessment levied upon private property.<sup>1</sup>

Where the right to compensation for a change of grade is given by statute, then the property owner is entitled to damages if injured by the change, whether the work was negligently done or not, but, to entitle him to a recovery, he must show some substantial injury.<sup>2</sup> The right is statutory, and is only given to

<sup>1</sup>Eyerman v. Blakesley, 13 Mo. App. 407; Kemper v. King, 11 Mo. App. 116.

<sup>2</sup>City of Kokomo v. Mahan, 100 Ind. 242; City of Anderson v. Bain (Ind.), 22 N. E. R. 323; Burham v. Ohio, etc., Co. (Ind.), 23 N. E. R. 799. It is held in Conklin v. Keokuk, 73 Ia. 343, S. C. 35 N. W. R. 444, that whether improvements have been made according to the grade of the street as previously established or whether there is such a change

of grade as entitles the owner to damages under the statute is a question of fact. When the city confirms an order changing the grade the property owner becomes entitled to damages at once. *Ibid.* An appeal will lie, under the general statute, from an award of damages for a change of grade. Robinson v. St. Paul (Minn.), 41 N. W. R. 950; Millvale v. Poxon, 123 Pa. St. 497, S. C. 16 Atl. R. 781. A notice of appeal,

those who actually sustain an injury ; where, therefore, no substantial injury appears, there is no right of action. A case of this character does not stand upon the common law, and, therefore, is not within the rule that an action will lie where there is an invasion of a right, although no substantial injury is shown, for it is of the essence of the statutory right that it should affirmatively appear that the complaining property owner has sustained substantial damages. Where the right of action is purely of statutory creation, as it is in nearly all of the States, where it exists at all, the change for which an action will lie must be one made by the city, and not one made by a town or village which has grown into a city.<sup>1</sup> Any other rule would, in a country like ours, where cities grow so rapidly and changes come so fast and frequent, almost completely check progress and render improvement practically impossible. The change of grade is a permanent matter and all resulting injury must be recovered in one action, for the property owner can not maintain successive actions as each fresh annoyance or injury occurs.<sup>2</sup> The reason for this rule is not far to seek. What is done under color of legislative authority and is of a permanent nature, works an injury as soon as it is done, if not done as the statute requires, and the injury which then accrues is, in legal contemplation, all that can accrue, for the complainant is not confined to a recovery for past or present damages but may, also, recover prospective damages resulting from the wrong. It is evident that a different rule would lead to a multiplicity of actions, and produce injustice and confusion. It is in strict harmony with the rule which prevails, and has long prevailed, in cases where property is seized under the right of eminent domain.<sup>3</sup> Grades are changed under a sovereign right closely akin to the right just named, and it is in accordance with established practice to

although informal, will be sufficient. *Hudnut*, 112 Ind. 542; *Central Branch Conklin v. Keokuk*, 73 Ia. 343; S. C. 35 N. W. 444.

<sup>1</sup>*City of Wabash v. Alber*, 88 Ind. 428; *Gardner v. Town of Johnston* (R. I.), 12 Atl. R. 888.

<sup>2</sup>*City of Lafayette v. Nagle*, 113 Ind. 425; *City of North Vernon v. Voegler*, 103 Ind. 314; *City of Terre Haute v.*

*Hudnut*, 112 Ind. 542; *Central Branch R. R. Co. v. Andrews*, 26 Kan. 702.

<sup>3</sup>*Lafayette, etc., Co. v. New Albany, etc., Co.*, 13 Ind. 90, S. C. 74 Am. Dec. 246; *Chicago, etc., Co. v. Loeb*, 118 Ill. 203, S. C. 59 Am. R. 341; *Elizabethtown, etc., R. R. Co. v. Combs*, 10 Bush. 382, S. C. 19 Am. R. 67.

apply to such cases the rule which governs analogous cases. A change of grade is presumptively made because the public good requires it, and it has nothing in common with a nuisance, so that the rules which apply as against one who creates and continues a nuisance, can not, with reason, be applied to public officers who order a public work, which, it is to be presumed, the public good requires and which is of a permanent and unchangeable nature. Grades once established are presumptively permanent and can not, it is obvious, be changed without causing injury and confusion. The grade of a street can seldom be changed without inconvenience to the public and never without entailing expense upon the adjoining owners or upon the municipality. In many cases, as where improvements are made with reference to the grade as established, a change would cause great injury to private property, and in some instances it would impose a heavy burden upon the public corporation. The presumption of the permanency of the grade once established is the only reasonable and defensible one, and it is, therefore, just to apply to such cases the rule which governs in cases where the improvement is permanent. It is not reasonable to apply the rule which prevails in cases where a nuisance is created which is capable of abatement or removal and is not a thing of a permanent nature. The general rule is that where the act complained of is of a permanent nature, all the damages must be recovered in one action, and this rule should govern in actions for injuries resulting from a change of grade.<sup>1</sup>

It is the duty of the highway officers to exercise reasonable care and skill in making improvements and repairs, and if injury results to property from the failure to exercise such care or skill, the municipality will be liable. Where it is necessary to

<sup>1</sup> *Town of Troy v. Cheshire, etc., Co.*, 3 Foster N. H. 83; *Elizabethtown, etc., Co. v. Combs*, 10 Bush. 382, S. C. 19 Am. R. 67; *Central Branch R. R. Co. v. Andrews*, 26 Kan. 702; *National Copper Co. v. Minnesota, etc., Co.*, 57 Mich. 83, S. C. 58 Am. R. 333; *Adams v. Hastings*, 18 Minn. 260; *Cadle v. Muscatine, etc., R. R. Co.*, 44 Ia. 11; *Fowle v. New Haven, etc., Co.*, 112 Mass. 334, S. C. 17 Am. R. 106; *Powers v. Council Bluffs*, 45 Ia. 652, S. C. 24 Am. R. 792; *Seely v. Alden*, 61 Pa. St. 302; 3 *Sutherland on Damages*, 403; *Mayne on Damages*, 138; 26 Am. Law Reg. 281, 345.

establish a grade before making improvements or repairs and the corporate officers proceed with the work without establishing the grade, the corporation will be responsible for resulting injuries.<sup>1</sup> The officers must do what the law enjoins, and if they omit this, a property owner who sustains a special injury may have his action. The element of negligence or of wrong is, as we have said, the controlling one in this class of cases, for at common law and in the absence of a statute, the municipality is not liable for consequential damages.

Highway officers have no right to invade private property, negligently or intentionally, while prosecuting a public improvement. If they wrongfully enter upon such property, or if they wrongfully or negligently throw upon it soil or gravel, the municipality which they represent must respond in damages to the property owner injured. An entry on private property, the deposit of materials upon it, or the negligent casting of soil or gravel upon it, is something more than mere consequential damages resulting from the improvement.<sup>2</sup> The officers may, however, use all of the way belonging to the public when necessary to properly fit it for the purpose for which it was set apart and may, when the public good demands it, destroy

<sup>1</sup>*Schneider v. City*, 40 N. W. R. 329; *Meinzer v. Racine*, 70 Wis. 561. The notice of the enactment of the ordinance providing for the change must be given as the statute directs or there will be no authority to change the grade, and the municipality will be liable to adjoining property owners who suffer special injury. *Meyer v. Fromm*, 108 Ind. 208. Where a statute requires an act to be done before proceeding with the work it is an actionable wrong on the part of the municipality to undertake the work without doing what the statute commands. Thus, where the statute required an ordinance for the improvement of a street and the municipal authorities graded the street without the passage of such an ordinance, the municipality was held liable. P.

*E. Church v. Anamosa*, 76 Ia. 538, S. C. 41 N. W. R. 313.

<sup>2</sup>*Hendershott v. City of Ottumwa*, 46 Ia. 658, S. C. 26 Am. R. 182; *Waldron v. Haverhill*, 143 Mass. 582; *Town of Martinsville v. Shirley*, 84 Ind. 546; *Platter v. City of Seymour*, 86 Ind. 323; *Vanderlip v. Grand Rapids (Mich.)*, 41 N. W. R. 677; See *Montgomery v. Townsend*, 84 Ala. 470, S. C. 4 So. R. 780. If, however, the soil falls upon the adjoining property and there is no negligence, the weight of authority is that the injury is a consequential one for which no action will lie. *Fellows v. City of New Haven*, 44 Conn. 240, S. C. 26 Am. R. 447, and authorities cited in note, p. 457. But it is not to be inferred from this that the local officers have a right to enter on adjoining property.



the right of herbage and the like, without being deemed invaders of private rights. Whether it is, or is not, necessary to occupy and fit the entire width of the road for travel must, in the great majority of cases be a question for the decision of the local authorities, and their decision can not be subject to judicial review unless it appears that their discretion has been abused. There may, perhaps, be cases where the local officers have so wantonly and unjustly increased the servitude of the suburban ways as to warrant the interference of the courts, but these cases must be rare, and it would require a very strong case to justify the interference of the judiciary, for, in every instance where land is set apart for a road or street, it becomes subject to the control of the highway officers, and they may devote every part of it to the public use for travel. It is seldom, indeed, that any tribunal or body except the highway officers can have any right to pass upon the question as to how much of the way shall be improved for the purpose of passage. The way is primarily devoted to that use, and to that use all other rights may be subordinated whenever the highway officers, acting fairly and within the limits of a reasonable discretion, determine that the public necessity demands that the owner of the fee be entirely excluded from enjoying any private rights in the road or street that will in anywise interfere with the free and convenient use of it by the public.

The fact that the improvement can not be made without trespassing upon private property will not relieve the municipality from liability. Where there is an entry upon private property, either by depositing soil upon it, or by entering upon it for the purpose of doing work, private rights are invaded and an action will lie. Such an entry, if more than a mere transient trespass, may well be deemed a taking of private property within the meaning of the constitution.<sup>1</sup> At all events the right to use an entire way from side to side and end to end is the extent of the authority of the highway officers, and when they, by a direct act, or an indirect act wrongfully performed, enter upon private property they become trespassers, and either they or the munic-

<sup>1</sup> Ward v. Peck (N. J.), 6 Atl. Rep. 805.

ipality they represent will be liable in damages.<sup>1</sup> If the municipal officers do not exercise the delegated power in a lawful mode their acts can not be justified or supported, and their principal becomes liable for all injuries proximately resulting from their wrongful acts.<sup>2</sup> It is obvious from what we have said respecting the rights of abutting owners, that the municipal officers should be required to substantially follow the law in all material particulars, for the abutters have a right, in view of the extraordinary nature and extent of the power, to demand that all the statutory requirements shall be substantially obeyed. This is essential to their protection and to prevent the established common law rule upon the subject of the change of grades (a harsh one at the best) from working injustice.

It is necessary that the municipal officers should proceed in substantial accordance with the law, for, as their authority comes from the law alone, they may, under the ancient and well established rule, be regarded as trespassers from the beginning, if they depart from the law in any material particular. It is the law alone which clothes them with authority, and if they abuse that authority in a substantial particular, they become trespassers, and for their trespasses their superior must respond in damages. They must establish the grade substantially in the mode pointed out by the law, and in doing the work they must conform to the grade thus established.<sup>3</sup>

It is a familiar general rule that a land owner is entitled to support for his land in its natural state from the adjoining land, but that he is not entitled to lateral support for buildings or improvements placed upon it.<sup>4</sup> The result to which an application of this rudimental principle clearly leads is, that the

<sup>1</sup> *Broadwell v. City*, 75 Mo. 213, S. C. 42 Am. R. 406; *Hendershott v. City*, 46 Ia. 658, S. C. 26 Am. R. 182; *Platter v. City of Seymour*, 86 Ind. 323; *Mayo v. City of Springfield*, 136 Mass. 10.

<sup>2</sup> *Dore v. Milwaukee*, 42 Wis. 108; *Crossett v. Janesville*, 28 Wis. 420; *City of Delphi v. Evans*, 36 Ind. 90; *Chambers v. Satterlee*, 40 Cal. 497.

<sup>3</sup> *Cole v. Muscatine*, 14 Iowa. 296; *Thompson v. Booneville*, 61 Mo. 282;

*Schneider v. City*, 40 N. W. R. 329; *Meinzer v. Racine*, 70 Wis. 561; *Meyer v. Fromm*, 108 Ind. 208.

<sup>4</sup> *Gilmore v. Driscoll*, 122 Mass. 199, S. C. 23 Am. R. 312; *Thurston v. Hancock*, 12 Mass. 220; *Wyatt v. Harrison*, 3 B. & A. 871; *Bonomi v. Backhouse*, 9 H. L. Cases, 513. This subject is discussed in an article in 16 Am. Law Review, 513, entitled "Support Lateral, (Adjacent) and Subjacent."

municipality, having a full right to improve the street, may, if it conducts the work with ordinary care and skill, deprive buildings and improvements of lateral support, but when the rule is carried beyond this there seems to be some difficulty in maintaining it. The weight of authority, however, sustains Judge Dillon's statement, that "The abutting owner has as against the city no right to the lateral support of the soil of the street, and can secure none from prescription by lapse of time."<sup>1</sup> But notwithstanding this rule we think that the city has no right to enter upon the work of improving a street without affording an adjoining owner an opportunity to protect his property from injury. It must, in order to do this, adopt such a plan as will enable him to ascertain, by the exercise of ordinary prudence and diligence, the nature of the improvement, and to form some judgment of what it necessary for him to do in order to protect his property. We believe, too, that a reasonable time should be allowed him in which to take measures to protect his property from injury.

If there is negligence in the work of improving the street the municipal corporation will be liable, although there may be no actual entry upon abutting property. Thus, if gutters are so negligently constructed as to turn the water gathered in them by the grading of a street into the basement of a building, the city will be liable.<sup>2</sup> It is held in another case that if work is so negligently done as to cause soil from a steep hillside to fall the corporation is liable.<sup>3</sup> But, in accordance with the rule to which we have often referred, it would seem that if ordinary care and skill are exercised, and the caving in of a hillside is an incident of the improvement, no action will lie, except, of course, in those jurisdictions where a liability is created by statute, since such a result is one which follows from the work itself and not from want of care or skill, and comes within the rule denying a recovery for consequential damages resulting from the performance of a public work authorized by law.

<sup>1</sup> Dillon's Municipal Corp. (3d ed.), City of Elgin v. Kimball, 90 Ill. 356; section 991. Ellis v. Iowa City, 29 Ia. 229.

<sup>2</sup> City of Aurora v. Gillett, 56 Ill. 132; City of Aurora v. Reed, 57 Ill. 29; City of Bloomington v. Brokaw, 77 Ill. 194;

<sup>3</sup> Keating v. Cincinnati, 38 Ohio St. 141, S. C. 43 Am. R. 421.

If the falling of the earth is an incident of the improvement, and not attributable to want of ordinary skill or care in performing the work, there is no liability.<sup>1</sup> The reason frequently given for the rule is, that if the land is dedicated for a street the donor must be presumed to anticipate the results which will follow from a rightful use of it, or if the land is seized under the right of eminent domain, the damages awarded are supposed to compensate the owner for any lawful use that may be made of the way. In several of the cases referred to in the note it is held that a city is not bound to build a wall to prevent the earth from caving, but while this is the general rule, we are disposed to accept as correct the opinion of some of the courts that there may be cases where it would be the duty of the municipality to construct a wall.<sup>2</sup> The authorities declare that ordinary care is always required, and that what would be required of an individual under like circumstances is required of the corporation.<sup>3</sup> It is not difficult to conceive cases where ordinary care would require the construction of a wall, or other protection, to prevent injury to adjoining property, and in such cases it should be built, or the city be compelled to make compensation for the loss actually sustained from the failure to suitably protect the adjoining property from injury.

Broad as the discretion of the local authorities is, they are, nevertheless, not beyond judicial control. If they order an improvement for the purpose of oppressing land owners, or from malice, or from mere wantonness, the courts will interfere to protect the property owners.<sup>4</sup> But errors of judgment can not be deemed an abuse of authority unless, indeed, they are so gross as to amount to fraud or to constitute oppression. As long as the municipal officers keep within the limits of their

<sup>1</sup> *Transportation Co. v. Chicago*, 99 U. S. 635; *Cumberland v. Willison*, 50 Md. 138; *Taylor v. St. Louis*, 14 Mo. 20; *St. Louis v. Gurno*, 12 Mo. 414; *Pontiac v. Carter*, 32 Mich. 164; *Rome v. Omberg*, 28 Ga. 46; *Roll v. Augusta*, 34 Ga. 326.

<sup>2</sup> *Meares v. Wilmington*, 9 Ired. (N. C.) 73; *Keating v. Cincinnati*, 38 Ohio St. 141, S. C. 43 Am. R. 421.

<sup>3</sup> *Cotes et al. v. City of Davenport*, 9 Ia. 227; *Rochester White Lead Works v. City of Rochester*, 3 Coms. (N. Y.) 463; *Bailey v. Mayor*, 2 Denio, 440; *Ross v. City of Madison*, 1 Ind. 281.

<sup>4</sup> *Rounds v. Mumford*, 2 R. I. 154; *Reynolds v. Shreveport*, 13 La. Ann. 426; *Mayor v. Randolph*, 4 Watts & S. 514.

authority and act fairly, their conduct in ordering or making improvements is not subject to judicial review, even though injury may result to the owners of adjoining property.<sup>1</sup>

Where the improvements are made by the officers chosen by the municipal corporation and acting for it, the corporation is liable for injuries resulting from their negligence, except in cases where the improvement is one which the corporation had no authority to make, but where the officers by whom the improvements are made are not officers of the corporation the municipality is not liable. The general rule is that the corporation is not responsible unless the persons who order or conduct the work are chosen by it and are subject to its control.<sup>2</sup> Where the legislature provides for making a specific public improvement and does not authorize the municipal corporation to select the officers who shall control and direct it, the corporation is not liable for injuries resulting from the negligence of those by whom the work is performed. Nor is the corporation liable where it selects an officer to do a specified act for the State. It is not, indeed, liable for all of the acts of the officers over whom it has control, for it is only liable for such acts as those officers perform as the representatives of the corporation, that is, for corporate acts as distinguished from public acts performed by them as the representatives of the State or government.<sup>3</sup> Where the officer is invested with independent powers the municipal corporation is not responsible for his acts (although it may have appointed him) beyond the scope of his authority as a corporate officer.<sup>4</sup>

<sup>1</sup> *Pepper v. City*, 114 Pa. St. 96; *Roberts v. Chicago*, 26 Ill. 249; *Snyder v. Rockport*, 6 Ind. 237; *Reynolds v. Shreveport*, 13 La. Ann. 426.

<sup>2</sup> *Scott v. Manchester*, 2 H. & N. 204; *Barnes v. District of Columbia*, 91 U. S. 540; *Mead v. New Haven*, 40 Conn. 72; *Ham v. New York*, 70 N. Y. 459; *Sullivan v. Holyoke*, 135 Mass. 273; *Martin v. Brooklyn*, 1 Hill, 545; *Terry v. New York*, 8 Bosworth, 504; *Treadwell v. New York*, 1 Daly, 123.

<sup>3</sup> *Ball v. Winchester*, 32 N. H. 435; *Hardy v. Keene*, 52 N. H. 370; *New*

*York, etc., Co. v. Brooklyn*, 71 N. Y. 580; *Winbigler v. Los Angeles*, 45 Cal. 36; *Wright v. Augusta*, 78 Ga. 241, S. C. 6 Am. St. R. 256; *Maximillian v. New York*, 62 N. Y. 160; *Peters v. Lindsborg*, 40 Kan. 654, S. C. 20 Pac. 490; *LeClef v. Concordia (Kan.)*, 21 Pac. 272; *Bryant v. St. Paul*, 33 Minn. 289; *McCarthy v. Boston*, 135 Mass. 197; *Sullivan v. Holyoke*, 135 Mass. 273; *Summers v. Daviess Co.*, 103 Ind. 262, S. C. 53 Am. R. 512.

<sup>4</sup> *Walcott v. Swampscott*, 1 Allen, 101; *Hafford v. New Bedford*, 16 Gray,

It is only for negligence connected with the work of improving or repairing that the municipal corporation is responsible to an adjoining property owner. A wrong done by an officer or agent of the city employed in conducting an improvement, or in working upon a street, is not the act of the city in such a sense as to bring it within the maxim *respondeat superior*, unless the act is done in carrying on the work of making the improvement or is proximately connected with it.<sup>1</sup>

Where the statute requires the municipality to pay or tender the damages caused by a change of grade, it has no right to proceed until this is done, and if it does an action will lie. The authority delegated is to proceed with the work in accordance with law, and if the municipal officers attempt to proceed in any other mode, they act, in legal contemplation, without authority and subject their principal to an action as a wrong-doer who has invaded private rights.<sup>2</sup> The property owner who sustains and shows a substantial injury may, if he elects, enjoin the prosecution of the work until the damages are assessed and tendered.<sup>3</sup>

The statutory right to damages is generally a broad one, and gives to the property owner a claim, not only for the loss of the lateral support to his land, but also for injury sustained by the change in the grade of the street in so far as it injuriously affects his improvements and the market value of the lot. We have been unable to find any direct adjudication as to the measure of damages, and do not undertake to lay down any general rule further than that embodied in the statement just made. It is quite clear that the mere fact that a change has been made will not authorize the inference that private property is injured; on the contrary, the burden of showing a substantial injury

297; *Buttrick v. Lowell*, 1 Allen, 172; *Reilly v. Philadelphia*, 60 Pa. St. 467; *Altwater v. Baltimore*, 31 Md. 462; *Wheeler v. Cincinnati*, 19 Ohio St. 19.

<sup>1</sup> *White v. Phillipston*, 10 Metc. 108; *Bigelow v. Randolph*, 14 Gray, 541; *Child v. Boston*, 4 Allen, 41; *Barney v. Lowell*, 98 Mass. 571. We have elsewhere considered the rule which gov-

erns where there is an independent contractor.

<sup>2</sup> *City of Kokomo v. Mahan*, 100 Ind. 242; *City of Logansport v. Pollard*, 50 Ind. 151; *Hempstead v. City of Des Moines*, 52 Ia. 303; *Noyes v. Town of Mason City*, 53 Ia. 418.

<sup>3</sup> *Phillips v. The City of Council Bluffs*, 63 Ia. 576; *City of Kokomo v. Mahan*, 100 Ind. 242.

rests upon the property owner, for the presumption is that the public officers, having no private interests to subserve, have not done a wrongful act to the injury of the citizen.

If the highway officers use reasonable prudence and care in selecting persons of skill to control and lay out the improvement, and take ordinary care to see that the persons that are so employed exercise skill and care, the public corporation will not be liable if it should turn out that the plan adopted was an unsuitable, defective, or improper one. If the officers take due care to obtain skillful advice and assistance the corporation they represent can not be deemed guilty of negligence.<sup>1</sup> It is not enough to entitle the property owner injured by a defect in the plan of a public improvement to show that the plan was not a judicious one,<sup>2</sup> but if the work is one which ordinary care and prudence require should not be undertaken without the advice and assistance of a skillful person, then it may be negligence to enter upon the work without such assistance and advice.<sup>3</sup> If, for instance, highway officers, having themselves no skill or experience in blasting a tunnel, should undertake the work upon a plan devised by themselves, and the work should result in the destruction of adjacent property, because the plan was wholly imperfect and unsuitable, there can, as we believe, be no just reason for exonerating the public corporation from liability. To deny liability would be to deny the rule as old as the cases referred to in the note; not only this, for it would be a violation of the ancient rule which applies to surgeons, attorneys, to engineers, mechanics, and to others, that no man has

<sup>1</sup> *Sutton v. Clarke*, 6 Taunt. 29.

<sup>2</sup> *Johnston v. District of Columbia*, 118 U. S. 19. The decision in the case here cited does not touch upon the question of negligence in undertaking a work without securing competent advice where ordinary care requires that it should be obtained before undertaking the work.

<sup>3</sup> In the leading case of *Sutton v. Clarke*, 6 Taunt. 29, the court referred with decided approval to the case of *Loder v. Moxon*, 3 Wils. 461 (2 Blk. 924), wherein the corporation was held

liable, although the defect was in the plan, but the court discriminated between that case and the one before it, and, speaking of the officers, said: "They informed themselves as well as they could by the opinion of their surveyor, how this might be done without injury to the surrounding grounds. No imputation of negligence rests on them, and they did the act in the manner, which, according to the best information they could obtain, was the best mode."

a right to undertake a work requiring skill unless he possesses it. On the other hand, all that can be expected of the highway officers is "that they shall bring to the service reasonable care and judgment, and that the professional men employed by them in planning and superintending the work shall have all the knowledge and skill that experience in such work would naturally give them."<sup>1</sup>

If the improvement is one entirely beyond the scope of the authority conferred upon the municipality it is not liable to one who sustains an injury from the negligence of those engaged in doing the work. In one of the leading American cases upon this subject, a bridge, which the city had no authority to erect, was built across a stream, and it was held that the city was not liable, although its officers were guilty of negligence.<sup>2</sup> The general question was considered in another case, and it was held that where the improvement of a street was beyond the authority of the municipal corporation and unauthorized by it no action would lie against it.<sup>3</sup> The general rule has been applied in very many cases, and while there is no substantial diversity of opinion respecting the rule as we have stated it, that is, that where the act is entirely beyond the authority of the corporation there is no corporate liability, there is some diversity of opinion as to its proper application.<sup>4</sup> It is important to

<sup>1</sup> *Diamond Match Co. v. Town of New Haven*, 55 Conn. 510. In the Chapter on Drains and Sewers we have at length considered the general subject, and as the rule must be the same whatever the character of the public improvement, what is there said is applicable to grading and paving as are the authorities there cited.

<sup>2</sup> *Mayor, etc., v. Cunliff*, 2 N. Y. 165.

<sup>3</sup> *Thayer v. Boston*, 19 Pick. 511. In that case Shaw, C. J., speaking of the acts of the officers, said: "But if they do not act within the scope of their authority, they act in a manner which the corporation has not authorized, and in that case the officers are personally responsible."

<sup>4</sup> In *Smith v. City of Rochester*, 76 N.

Y. 506, the court said: "It is essential, however, to establish such a liability, that the act complained of must be within the scope of the corporate powers as provided by charter or positive enactment of law. If the act done is committed outside of the authority and power of the corporation, the corporation is not liable, whether its officers directed its performance or it was done without any express authority or command." This is a fair statement of the prevailing opinion. *Cummins v. City*, 79 Ind. 491; *Haag v. Board*, 60 Ind. 511; *Morrison v. Lawrence*, 98 Mass. 219; *Anthony v. Adams*, 1 Metc. (Mass.) 284; *Walling v. Shreveport*, 5 La. Ann. 660; *Mitchell v. Rockland*, 52 Me. 118; *Cuyler v. Rochester*, 12



bear in mind the distinction between acts that are entirely beyond the scope of the municipal authority and acts which, although wrongful and illegal, are not beyond the scope of the corporate authority. There is, undoubtedly, a distinction between the two classes of cases, but particular cases frequently fall so near the line that it is sometimes difficult to determine on which side they rightfully belong. It was held in one case that a city was not liable for work negligently done in the improvement of a street under a void vote of the common council.<sup>1</sup> In another case the decision was, that there is no liability, even for negligence, where the city had no authority at all to make an alteration in a street which they undertook to make.<sup>2</sup> Where there is no authority at all to act, as other cases hold, the public corporation is not liable for a positive wrong or trespass.<sup>3</sup> It is not sufficient to charge the corporation that the act was done under color or claim of authority, for it must appear that the corporation had authority over the general subject.<sup>4</sup> But it is not necessary that it should appear that the particular wrong was authorized, for it is only where the act is, in the strict sense of the term, *ultra vires* that the municipality can escape the consequences of the culpable negligence of its officers and agents. Thus, where there is general authority to construct a road in a particular place, the corporation is liable for negligence, although it does not conform to the statute in the mode of constructing its road.<sup>5</sup> So, where there is authority to construct highways, and the officers in constructing or improving the authorized highways commit a trespass, the pub-

Wend. 165; *Cavanagh v. Boston*, 139 Mass. 426; *Horn v. Baltimore*, 30 Md. 218; *Barbour v. Ellsworth*, 67 Me. 294.

<sup>1</sup> *Cavanagh v. Boston*, 139 Mass. 426. It is doubtful whether this case is in harmony with the weight of judicial opinion.

<sup>2</sup> *Cuyler v. Rochester*, 12 Wend. 165. See, upon the general subject, *City of Peru v. Gleason*, 91 Ind. 566; *Schipper v. City of Aurora (Ind.)*, 22 N. E. R. 878; *Hitchcock v. Galveston*, 96 U. S. 341; *Dill v. Wareham*, 7 Metc. 438.

<sup>3</sup> *Morrison v. Lawrence*, 98 Mass. 219; *Swift v. Williamsburg*, 24 Barb. 427; *Starr v. Rochester*, 6 Wend. 564; *Baltimore v. Eschbach*, 18 Md. 276; *Browning v. Owen Co.*, 44 Ind. 11; *Brown v. Vinalhaven*, 65 Me. 402, S. C. 20 Am. R. 709; *Donnelly v. Tripp*, 12 R. I. 97; *Campbell v. Montgomery*, 53 Ala. 573.

<sup>4</sup> *Horn v. Baltimore*, 30 Md. 218; *State v. Mayor*, 29 Md. 85; *Cole v. Nashville*, 4 Sneed. (Tenn.) 162.

<sup>5</sup> *Pekin v. Newell*, 26 Ill. 320.

lic corporation must respond in damages.<sup>1</sup> At the expense of something like repetition, we say that the question in each case is, not whether the municipality had authority to order the particular improvement, but whether the improvement is one of a class or kind over which the general authority extends.<sup>2</sup>

There is a clear and an important distinction between acts beyond the authority of the public corporation and the unauthorized acts of subordinate officers or agents. While it is true that a municipal corporation is not ordinarily responsible for the unauthorized act of a subordinate officer or agent, it is, nevertheless, true that it may make itself liable for the consequences of such an act by a subsequent ratification,<sup>3</sup> but where the act is wholly outside of the authority of the corporation, it is incapable of ratification.<sup>4</sup> It is obvious that what the corporation had no power to do in the first instance it can not do by a subsequent confirmation of the illegal act. In the one case, the question is as to the power of the corporation to do the act, in the other, the question is as to whether it authorized or empowered a subordinate officer or agent to do it. In the one case, the question is one of capacity in the principal, in the other, the question is whether the agent acted within the scope of his authority. Where there is an entire want of power the act is ut-

<sup>1</sup> *Lee v. Sandy Hill*, 40 N. Y. 442; *Buffalo, etc., v. Buffalo, etc., Co.*, 58 N. Y. 639; *Woodcock v. Calais*, 66 Me. 234; *Sherman v. Grenada*, 51 Miss. 187; *Hildreth v. Lowell*, 11 Gray, 345; *Danbury, etc., Co. v. Norwalk*, 37 Conn. 109; *Chicago v. McGraw*, 75 Ill. 566; *Leman v. New York*, 5 Bosworth, 414; *Hawks v. Charlemont*, 107 Mass. 414; *Crossett v. Janesville*, 28 Wis. 420; *Hunt v. Booneville*, 65 Mo. 620; *Ashley v. Port Huron*, 35 Mich. 276, S. C. 24 Am. R. 552.

<sup>2</sup> *Stanley v. Davenport*, 54 Ia. 463. In this case it was said: "It is suggested that the act of the city council being without authority the city is not responsible for any consequences resulting therefrom. The city had jurisdiction

of the subject-matter, that is, of the streets, and could only act in relation thereto through its council. The latter had control of the streets of the city, but were mistaken as to the extent of their authority. The particular thing the council authorized to be done was illegal, and we think the city is responsible for the damages resulting therefrom."

<sup>3</sup> *Thayer v. Boston*, 19 Pick. 511; *McGarry v. Lafayette*, 12 Rob. (La.) 668; *Ross v. Madison*, 1 Ind. 281; *Hunt v. Booneville*, 65 Mo. 620; *Donnelly v. Tripp*, 12 R. I. 97.

<sup>4</sup> *Hodges v. Buffalo*, 2 Denio, 110; *Boom v. Utica*, 2 Barb. 104; *Mitchell v. Rockland*, 52 Me. 118.

terly void, and an act that is really void is incapable of having vitality infused into it by a ratification.

There is a distinction between public and private corporations, and the former may successfully plead that the act which caused the injury was *ultra vires* when the latter could not.<sup>1</sup> A public corporation is, in truth, part of the governmental machinery, and its officers are public officers, acting for the benefit of the public with powers limited and defined by statute. The acts of these officers are public and the law, of which all must take notice, limits and defines their power, and when they wrongfully exceed it, and trespass upon the rights of others, they may, perhaps, render themselves liable personally, but they do not bind the corporation. The act of the officers is the act of the corporation only when done within the general scope of the authority expressly or impliedly conferred upon the municipality. Where the act of a public corporation is in no sense within the general scope of the authority conferred upon it, the defence of *ultra vires* may be successfully interposed, and this is true although the corporate officers and the persons dealing with them, or affected by their acts, may have misconceived the extent of their authority.<sup>2</sup> It is the doctrine of some of the courts that a city is not liable for the acts of its officers in attempting to enforce a void ordinance enacted by the common council,<sup>3</sup> and these cases are typical representatives of a gen-

<sup>1</sup> Driftwood, etc., Co. v. The Board, 72 Ind. 226.

<sup>2</sup> Seele v. Deering, 79 Me. 343; Fowle v. Alexandria, 3 Peters, 398; Cheeny v. Brookfield, 60 Mo. 53; Marsh v. Fulton Co., 10 Wall. 676; Thomas v. Richmond, 12 Wall. 349; Burrill v. Boston, 2 Clifford C. C. 590; Martin v. Mayor, 1 Hill 545; McDonald v. New York, 68 N. Y. 23, S. C. 23 Am. R. 144; Loker v. Brookline, 13 Pick. 343; Philadelphia v. Flanigen, 47 Pa. St. 21; Trustees v. Cherry, 8 Ohio St. 564; Halstead v. Mayor, 3 N. Y. 430; Com'rs v. Cox, 6 Ind. 403; Estep v. Keokuk Co., 18 Ia. 199; Perry v. Superior City, 26 Wis. 64; Maupin v. Franklin, 67 Mo. 327. In

Herrington v. Corning, 51 Barb. 396, the doctrine is carried very far.

<sup>3</sup> Worley v. Inhabitants, etc., 88 Mo. 106; Trustees et al. v. Schroeder, 58 Ill. 353. The decision in the case first cited is placed upon the principle that a municipal corporation "is liable for the act of its agents, injurious to others, when the act is in its nature lawful and authorized, but done in an unlawful manner, or at an unauthorized place, but it is not liable for injurious and tortious acts, which are in their nature unlawful or prohibited." As supporting this doctrine, the court cites, Hunt v. City of Booneville, 65 Mo. 620; Rowland v. City of Gallatin, 75 Mo. 134;

eral class, but we do not think that the doctrine they assert can be applied to cases where an improvement is undertaken under an ordinance invalid because not regularly adopted, although it would doubtless apply to cases where there was entire lack of power to pass an ordinance directing the improvement. It seems to us that if an injury is actually inflicted upon a property owner by the negligence of the officers or agents of a city engaged in improving its streets, it would be flagrantly unjust to deny him redress on the ground that the ordinance was not enacted in the mode prescribed by statute. We are not, we add to make our meaning clearer, speaking of cases where there is no power to pass the ordinance or undertake the improvement, but of cases where there is a general authority over the subject and nothing more than a defective or irregular exercise of it in enacting the order or ordinance directing the particular improvement.

The public corporation may be responsible for the acts of officers assuming to act for it in improving or repairing a road or street, although they may not be officers *de jure*, but simply officers *de facto*, acting under color of authority. In a recent case it was held that towns are liable for the acts of road commissioners who enter upon the land of a citizen, and there deposit stone, soil and rubbish, although they have not been legally elected.<sup>1</sup> The decision is, as we believe, no more than a just application of the familiar rule that the acts of an officer *de facto* can not be collaterally attacked, but if the person assuming to act claimed to be a mere agent or servant of the public corporation there might be some difficulty in applying the principle, for we suppose the corporation would not be bound unless it had actually invested such a person with authority, or had expressly or impliedly held him out to the world as possessing the authority he assumes to exercise.

Thompson v. City of Booneville, 61 Mo. 282; Perley v. Inhabitants, 7 Gray, 464.

<sup>1</sup>Clark v. Easton, 146 Mass. 43. It was held in this case by the majority of the judges that the road commissioners were public officers for whose acts the town was not liable, but the point to

which we have cited it was fully discussed but was not decided. The court in the course of its opinion said: "All the considerations of public policy upon which the doctrine as to officers *de facto* is founded, apply in this case as strongly as in any case where there is illegality in the election of officers."

## CHAPTER XXI.

### DRAINS AND SEWERS IN HIGHWAYS.

An important use to which the streets and alleys of a city or incorporated town may be devoted, is that of drainage or sewerage. It is often impossible to construct a street or road without a proper system of drainage, and the authority to construct and maintain roads and streets seems naturally to carry with it the right to construct the necessary system of drainage. The question as to the right of a municipal corporation to construct sewers in its streets is, as we have heretofore shown, free from doubt, but there is more difficulty upon the question of the right to place sewers in rural roads. We think that where sewers form part of the improvement, and are reasonably necessary to make the road safe and convenient for travel, they may be placed in it, but perhaps no general rule can be definitely stated upon the subject. There can be no doubt, as we think, as to the right to use suburban roads for the drainage of connecting highways, or of highways forming part of the general system.

Where an owner of land dedicates it to the public for a road or street, he impliedly grants the appendant right to make such a use of it as shall suitably fit it for travel, and where land is seized under the power of eminent domain, compensation is measured upon the theory that the officers representing the public may so prepare and maintain it that the public may safely and conveniently use it as a passage way. Grant these fundamental propositions—and there occurs to us no good reason for doubting their validity—and it must follow that for carefully and skillfully doing what the public welfare requires, the local officers in control of the public way encroach upon no right and violate no duty. It is upon the principle stated that it is held in

strongly reasoned cases that highway officers may prepare and maintain an ordinary road for use without incurring liability for casting surface water upon adjoining lands, provided they do not collect it in a body and thus pour it upon the lands.<sup>1</sup>

An unauthorized obstruction of a natural water course is an actionable wrong.<sup>2</sup> But not every course over which water makes its way can be deemed a water course within the meaning of the law. Properly, a water course is a stream of water ordinarily flowing in a defined channel, having beds and banks, and flowing into some other stream or some body of water.<sup>3</sup> Ravines or swales through which the water occasionally flows, or through which surface water makes its way, are not natural water courses.<sup>4</sup> It is the duty of highway officers to use due care not to obstruct a water course, but ordinarily they are not required to make provision for surface water.

While it is established law that highway officers have no right to cause injury to the property of a citizen by obstructing the flow of a natural stream, it is also true that when the public necessity requires it<sup>5</sup> they may divert the flow of the water,<sup>6</sup> but in doing this they must not unnecessarily interfere with the rights

<sup>1</sup> *Flagg v. Worcester*, 13 Gray, 601; *Williams*, 25 Kan. 214; *Chicago, etc., Turner v. Dartmouth*, 13 Allen, 291; *Co. v. Morrow (Kan.)*, 22 Pac. R. 413; *Brayton v. Fall River*, 113 Mass. 236; *Wheeler v. Worcester*, 10 Allen, 591.

*Phinizy v. City Council*, 47 Ga. 260; *Stone v. Augusta*, 46 Me. 127; *Buchert v. Boyertown (Pa.)*, 17 Atl. R. 190; *Bell v. Norfolk, etc., Co.*, 101 N. C. 21, S. C. 7 S. E. 457; *Goulden v. Scranton*, 121 Pa. St. 97, S. C. 15 Atl. R. 383.

<sup>2</sup> *Conhocton, etc., Co. v. Buffalo, etc., Co.*, 3 Hun 523; *Eulrich v. Richter*, 37 Wis. 226; *Barnes v. Sabron*, 10 Nev. 217; *Earl v. De Hart*, 1 Beasley Ch. (N. J.) 280.

<sup>3</sup> *Luther v. Winnissimett Co.*, 9 Cush. 171; *Stanchfield v. Newton*, 142 Mass. 110; *Jeffers v. Jeffers*, 107 N. Y. 650; *Weis v. City of Madison*, 75 Ind. 253; *Fryer v. Warne*, 29 Wis. 511; *Rice v. City of Evansville*, 108 Ind. 7; *Howard v. Ingersoll*, 13 How (U. S.) 427; *Palmer v. Waddell*, 23 Kan. 352; *Gibbs v.*

<sup>4</sup> *Wheeler v. Worcester*, 10 Allen, 591; *Bangor v. Lansil*, 51 Me. 521; *Parks v. Newburyport*, 10 Gray, 28; *Hoyt v. Hudson*, 27 Wis. 656, S. C. 9 Am. R. 473; *Robinson v. Shanks*, 118 Ind. 125. See *West v. Taylor*, 16 Ore. 165. But water from a river which in times of freshets spreads over adjoining lands is not surface water. *Moore v. Chicago, etc., Co.*, 75 Ia. 263, S. C. 39 N. W. R. 390; *Byrnes v. Minneapolis, etc., Co.*, 38 Minn. 212, S. C. 8 Am. St. R. 668.

<sup>5</sup> They may, doubtless, in the proper case secure a right to obstruct the flow of a stream or to take the *corpus* of the water under the right of eminent domain upon payment of compensation, but not otherwise. *Bass v. City of Ft. Wayne (Ind.)*, 23 N. E. R. 259.

of others.<sup>1</sup> The right which riparian proprietors possess can not be substantially impaired by a diversion of the water, but a diversion that works them no material injury may be made when the highway officers in the just exercise of their discretion deem it necessary. This rule holds good as against the owner of the fee, subject always to the limitation that his rights shall not be impaired, and those rights are very comprehensive.<sup>2</sup>

The right to provide for the drainage of streets and to construct and repair sewers is generally granted to cities in express terms by their charters or by the statute governing their incorporation; but without any express grant of such authority, the right to exercise it is regarded as incident to the general power to maintain and control streets.<sup>3</sup> The authority of the municipality as to such matters may extend even beyond the city limits; and, unless prohibited by charter or statute, the city has inherent power to contract for and construct works beyond the corporate limits for the discharge of sewage where the same is necessary.<sup>4</sup> The use of a public way lying outside of its boundaries is not a new use or taking thereof for which the city must pay additional damages to the adjacent property owners.<sup>5</sup> Whether this right of municipal corporations to construct drains and sewers shall be exercised in any particular case or not, as well as the manner in which it shall be exercised, must be de-

<sup>1</sup> *Town of Suffield v. Hathaway*, 44 Conn. 521, S. C. 26 Am. R. 483.

<sup>2</sup> *Woodruff v. Neal*, 28 Conn. 167; *Jackson v. Hathaway*, 15 Johns. 447. But it is to be kept in mind that unless there is an appropriation by due process of law, the local authorities have no right to use the water even for a public purpose; as highway officers their right is to so dispose of it as to promote public convenience in the use of the highway. *Town of Suffield v. Hathaway*, *supra*.

<sup>3</sup> *Leeds v. Richmond*, 102 Ind. 372; *Cone v. Hartford*, 28 Conn. 363; *Griswold v. Bay City*, 35 Mich. 452; *In re Fowler*, 53 N. Y. 60; *Stoudinger v. Newark*, 28 N. J. Eq. 187; *Codman v. Evans*, 5 Allen, 309. It has also been

held authorized as an exercise of the police power for the preservation of the public health. *State v. Charleston*, 12 Rich. (S. C.) 702; *Ziggler v. Menges* (Ind.), 22 N. E. Rep. 782.

<sup>4</sup> *City of Coldwater v. Tucker*, 36 Mich. 474, S. C. 24 Am. Rep. 601. Compare *Hyde Park v. Spencer* (Ill.), 6 West. Rep. 517.

<sup>5</sup> *Cummins v. City of Seymour*, 79 Ind. 491, S. C. 41 Am. Rep. 618. But a statute authorizing the overseer of highways to enter upon private property and cut a drain is unconstitutional as attempting to authorize the taking of private property without compensation. *Ward v. Peck* (N. J.), 6 Atl. Rep. 805.

fermed by the corporation and not by the courts.<sup>1</sup> When, however, the corporation has ordered the construction of a sewer, and has entered upon the prosecution of the work, its duty becomes ministerial, and "where a judicial duty ends and ministerial duty begins, there immunity ceases and liability attaches."<sup>2</sup> If the necessity for a drain or sewer results from the negligent act of the corporation itself, it may be liable for not constructing the necessary drain or sewer.<sup>3</sup> It has no right to divert surface water, and, by artificial means, collect it in a body and discharge it upon the lands of private individuals.<sup>4</sup> So, where a city constructs a sewer so negligently that it obstructs the flow of water and causes it to set back on private property,<sup>5</sup> or where it knowingly permits earth from the sewer and material used in the work to remain in the street an unnecessary time in such condition as to obstruct the flow of water in the gutters and cause it to overflow on the premises of an adjoin-

<sup>1</sup> *Mayor v. Eldridge*, 64 Ga. 524, S. C. 37 Am. Rep. 89; *Leeds v. Richmond*, 102 Ind. 372; *Freburg v. Davenport*, 63 Ia. 119, S. C. 50 Am. Rep. 737; *Horton v. Mayor*, 4 Lea (Tenn.), 39; S. C. 40 Am. Rep. 1; *Carr v. Northern Liberties*, 35 Pa. St. 324, S. C. 78 Am. Dec. 342; *Lynch v. Mayor*, 76 N. Y. 60.

<sup>2</sup> *Jones v. New Haven*, 34 Conn. 1; *City of Denver v. Rhodes* (Col.), 13 Pac. Rep. 729.

<sup>3</sup> *Byrnes v. Cohoes*, 67 N. Y. 204; *Ellis v. Iowa City*, 29 Ia. 229; *Aurora v. Love*, 93 Ill. 521; *City of Indianapolis v. Lawyer*, 38 Ind. 348; *City of Crawfordsville v. Bond*, 96 Ind. 236.

<sup>4</sup> *Fremont, etc., Co. v. Marley*, 25 Neb. 138, S. C. 40 N. W. R. 948; *Olson v. St. Paul, etc., Co.*, 38 Minn. 419, S. C. 37 N. W. R. 953; *Rychlicke v. St. Louis (Mo.)*, 4 Lawyers' Rep. Anno. 594, S. C. 11 S. W. R. 1001; *Town of Sullivan v. Phillips*, 110 Ind. 320; *Weis v. City of Madison*, 75 Ind. 241, S. C. 39 Am. Rep. 135; *Nevins v. Peoria*, 41 Ill. 502, S. C. 89 Am. Dec. 392; *Inman v. Tripp*, 11 R. I. 520, S. C. 23 Am.

Rep. 520; *Field v. West Orange* (N. J.), 2 Atl. Rep. 236; *Pettigrew v. Evansville*, 25 Wis. 223; *Ashley v. Port Huron*, 35 Mich. 296, S. C. 24 Am. Rep. 552; *O'Brien v. St. Paul*, 25 Minn. 331, S. C. 33 Am. Rep. 470; *Hitchins v. Mayor*, 68 Md. 100, S. C. 6 Am. St. Rep. 422; *Pye v. Mankato*, 36 Minn. 373, S. C. 1 Am. St. Rep. 671; *Seifert v. Brooklyn*, 101 N. Y. 136; *Noonan v. Albany*, 79 N. Y. 470; *Bastable v. Syracuse*, 72 N. Y. 64; *Rychlicke v. St. Louis (Mo.)*, 29 Cent. L. J. 289; *Winn v. Rutland*, 52 Vt. 481; *Gillison v. Charleston*, 16 W. Va. 282, S. C. 37 Am. Rep. 763; *Troy v. Coleman*, 58 Ala. 570; *Orabtree v. Baker*, 75 Ala. 51, S. C. 57 Am. Rep. 424.

<sup>5</sup> *Rowe v. Portsmouth*, 56 N. H. 291, S. C. 22 Am. Rep. 464; *Rochester White Lead Co. v. Rochester*, 3 N. Y. 463; *Hitchins v. Mayor*, 68 Md. 100, S. C. 6 Am. St. Rep. 422; *Seifert v. Brooklyn*, 101 N. Y. 136, S. C. 54 Am. Rep. 664; *Semple v. Vicksburg*, 62 Miss. 63, S. C. 52 Am. Rep. 181.



ing owner, it will be liable for the resulting injury.<sup>1</sup> So, if it wrongfully diverts or obstructs the flow of a natural stream.<sup>2</sup> And the right to construct sewers must be so exercised as not to result in a nuisance.<sup>3</sup> A city is not, however, liable merely because water collects on land in consequence of its being lower than the grade of a street which the city had a right to establish.<sup>4</sup>

A municipal corporation is liable not only for negligence in constructing a sewer but also for negligently failing to perform or for negligently performing its duty to maintain and keep the sewer in proper condition and repair.<sup>5</sup> The property owners along the line of a sewer, having been assessed for the cost thereof, acquire a right to use it, and a corresponding duty rests upon the municipality to keep it in repair, for the violation of which the city will be liable at the suit of one injured thereby, although he may have connected his premises with the sewer for his own benefit.<sup>6</sup> It has been held that this liability does

<sup>1</sup> *Harper v. Milwaukee*, 30 Wis. 365; *City of Jacksonville v. Lambert*, 62 Ill. 519; *Farrell v. Mayor*, 12 Upper Can. Q. B. 343.

<sup>2</sup> *Weis v. Madison*, 75 Ind. 241, S. C. 39 Am. Rep. 135; *Hebron Gravel Road Co. v. Harvey*, 90 Ind. 192, S. C. 46 Am. Rep. 199; *Kellogg v. Thompson*, 66 N. Y. 88; *Perry v. Worcester*, 6 Gray, 544; *Phinizy v. Augusta*, 47 Ga. 260. Compare *Stanchfield v. Newton*, 142 Mass. 110. So, in Massachusetts, it is held that a city may be liable for making dry a well on adjoining property by the construction of a drain. *Trowbridge v. Brookline*, 3 N. Eng. Rep. 789.

<sup>3</sup> *Haskell v. New Bedford*, 108 Mass. 208; *Franklin Wharf Co. v. Portland*, 67 Me. 46; *Kobs v. Minneapolis*, 22 Minn. 159; *O'Brien v. St. Paul*, 18 Minn. 176; *Jacksonville v. Lambert*, 62 Ill. 519; *Columbus v. Woolen Mills*, 33 Ind. 435. Compare *Morse v. Worcester*, 139 Mass. 389.

<sup>4</sup> *Weis v. City of Madison*, 75 Ind.

241, S. C. 39 Am. Rep. 135; *Clark v. Wilmington*, 5 Harring. (Del.) 243; *Baxter v. Providence*, 12 R. I. 310; *Imler v. Springfield*, 55 Mo. 119; *Wilson v. Mayor*, 1 Denio, 595; *Lee v. Minneapolis*, 22 Minn. 13; *Fair v. Philadelphia*, 88 Pa. St. 309; *Flagg v. Worcester*, 13 Gray, 601; *Hoyt v. Hudson*, 27 Wis. 656.

<sup>5</sup> *Kranz v. Baltimore*, 64 Md. 491; *Child v. Boston*, 4 Allen, 41; *Barton v. Syracuse*, 36 N. Y. 54; *Lloyd v. New York*, 5 N. Y. 369; *Nims v. Troy*, 59 N. Y. 500; *Taylor v. Austin*, 32 Minn. 247; *Stock v. City of Boston (Mass.)*, 21 N. E. R. 871; *Frostburg v. Hitchins*, 70 Md. 56, S. C. 16 Atl. R. 380.

<sup>6</sup> *Semple v. Vicksburg*, 62 Miss. 63, S. C. 52 Am. Rep. 181; *City of Ft. Wayne v. Coombs*, 107 Ind. 75, S. C. 13 Am. & Eng. Corp. Cas. 469, S. C. 57 Am. Rep. 82; *Masterton v. Mt. Vernon*, 58 N. Y. 391; *Wendell v. Mayor*, 4 Keyes (N. Y.), 261; *Buchanan v. Duluth (Minn.)*, 42 N. W. R. 204. See *Maguire v. Cartersville*, 76 Ga. 84; *Eu-*

not attach until the city has had notice of the defective and insufficient condition of the sewer,<sup>1</sup> but where the defect is the natural result of the use of the sewer and could have been discovered and repaired by the exercise of a reasonable degree of care, or where it has existed for so long a time that the corporate authorities ought to have taken notice of the defect, proof of actual notice is unnecessary.<sup>2</sup>

In prosecuting the work of constructing a sewer a municipal corporation is bound to do so with a due regard to the rights of persons who travel the highway, and if it negligently omits to use such precautions as are reasonably necessary for the protection of travelers, it must respond in damages. But it is not bound to use more than ordinary care, but what is ordinary care depends upon the circumstances of the particular case. If barriers and lights are placed about an excavation for a sewer at nightfall and reasonable precaution is taken to secure them in position, the corporation will not ordinarily be liable if they are removed during the night by a wrong-doer without the knowledge of any of the municipal officers.<sup>3</sup>

It has often been said, in general terms, that a municipal corporation can not be held liable for injuries resulting from errors or defects in the plan of a public work,<sup>4</sup> and the Supreme Court of the United States has given at least a qualified sanction to

*faula v. Simmons*, 86 Ala. 515, S. C. 6 So. R. 47; *Edmondson v. Moberly* (Mo.), 11 S. W. R. 990.

<sup>1</sup> *Hitchins v. Mayor*, 68 Md. 100, S. C. 6 Am. St. Rep. 422. See, also, *Smith v. Mayor*, 66 N. Y. 295.

<sup>2</sup> *McCarthy v. Syracuse*, 46 N. Y. 194; *Todd v. Troy*, 61 N. Y. 506; *City of Ft. Wayne v. Coombs*, 107 Ind. 75; *Vanderslice v. Philadelphia*, 103 Pa. St. 102.

<sup>3</sup> *Doherty v. Waltham*, 4 Gray, 596; *Dooley v. Town of Sullivan*, 112 Ind. 451; *Seward v. Milford*, 21 Wis. 485; *Klatt v. Milwaukee*, 53 Wis. 196. The rule stated must be the true one in ordinary cases since any other would demand that a constant watch be kept,

and this would be the exaction of extraordinary vigilance. But, as we conceive, the rule, while a very general one, is not universal, for there may be cases where the probability of a removal of lights or barriers would be so great as to require greater precautions. It is evident that here, as elsewhere, much must depend upon the locality and its surroundings.

<sup>4</sup> *Child v. Boston*, 4 Allen, 41; *Merrifield v. Worcester*, 110 Mass. 216, S. C. 14 Am. Rep. 592; *Mills v. Brooklyn*, 32 N. Y. 489; *Urquhart v. Ogdensburg*, 97 N. Y. 238; *Monk v. New Utrecht*, 104 N. Y. 552; *Lansing v. Toolan*, 37 Mich. 152; *City of Denver v. Caspelli*, 4 Col. 25, S. C. 34 Am. Rep. 62.

this doctrine.<sup>1</sup> The reasons urged in support of the doctrine are, that planning or adopting a plan of a public improvement is a matter of a *quasi* judicial nature involving the exercise of judgment, and that the corporate authorities in so doing act as public officers rather than as agents of the city. We think, however, that the rule is too broadly stated in these cases, and that there are instances in which a city may be liable for injuries caused by defects in the plan of a street or sewer.<sup>2</sup> It seems to us that a distinction should be drawn between those cases in which the defect in the plan arises from a mere error of judgment and those in which the defect arises from negligence in devising or adopting the plan. Suppose, for instance, a man known to be incompetent is employed to devise a plan for a public improvement and the plan is adopted without any investigation of its merits, the result being that, notwithstanding the exercise of due care in performing the work according to the plan, an adjoining land owner is permanently deprived of access to his premises. Has the abutter no remedy in such a case? Is he not injured just as much as if the negligence had been in the work instead of the plan? Again, to take an illustration given by the court in an adjudged case, "suppose the common council to devise a plan for a bridge that will require timbers so slight as to give way beneath the tread of a child, can the city escape liability on the ground that there was only an error of judgment in devising the plan? \* \* \* The only rule that has any solid support in principle is, that for errors in judgment in devising a plan there is no liability, but there is liability

<sup>1</sup> *Johnston v. Dist. of Columbia*, 118 U. S. 19. But the question was not squarely presented, for, as we submit, it can only be presented where the case is one in which a work requiring skill is undertaken without securing the advice and assistance which ordinary prudence dictates. We have heretofore shown that the English cases are against and not in favor of the broad doctrine stated by some of the courts.

<sup>2</sup> Where no more skill or knowledge is required than such as men of fair ordinary knowledge and experience

possess, then doubtless there is no wrong in entering upon the work without the advice or assistance of skilled men. But suppose the councilmen of a town or village should undertake to construct a suspension bridge upon a plan of their own across a great river like the Hudson, the Mississippi, or the Ohio, would any one assert that they had used due care? and yet whosoever fails to use due care is guilty of negligence. The wrong is not so much in misjudging as in undertaking to judge where there is an utter lack of capacity.

where the lack of care and skill in devising the plan is so great as to constitute negligence."<sup>1</sup>

If the city has obtained the professional advice of one skilled in such matters, and has used due care in selecting its adviser, it will generally be free from liability, if, in consequence of following such advice, the structure, or other improvement, as the case may be, turns out to be defective.<sup>2</sup> It may also be aided by the presumption that its officers have done their duty.<sup>3</sup> But if it becomes apparent, during the progress of the work, that the plan adopted is defective, the city will be guilty of negligence if it completes the work according to that plan.<sup>4</sup>

The authority to construct drains and sewers is by some of the courts referred to the police power,<sup>5</sup> by others to the power of eminent domain,<sup>6</sup> while others hold that the authority to take property is exercised under the power of eminent domain, but

<sup>1</sup> *City of North Vernon v. Voegler*, 103 Ind. 314. Approved by Messrs. Shearman and Redfield in the last edition of their work on negligence, section 272. See, also, to same effect, *Gould v. Topeka*, 32 Kan. 485, S. C. 5 Am. & Eng. Corp. Cas. 595; *Ferguson v. Davis Co.*, 57 Ia. 601; *Powers v. Council Bluffs*, 50 Ia. 197; *Wilson v. Atlanta*, 60 Ga. 473; *City of Chicago v. Gallagher*, 44 Ill. 295; *Prideaux v. Mineral Point*, 43 Wis. 513; *City of Indianapolis v. Huffer*, 30 Ind. 235; *City of Evansville v. Decker*, 84 Ind. 325, S. C. 43 Am. Rep. 86; *Weis v. Madison*, 75 Ind. 241, S. C. 39 Am. R. 135; *Rice v. Evansville*, 108 Ind. 7, S. C. 58 Am. Rep. 22; *City of Ft. Wayne v. Coombs*, 107 Ind. 75. The cases heretofore cited in which municipal corporations were held liable for injuries resulting from sewers planned to collect and cast surface water in a body upon land of another, lend support to this doctrine, and a city is certainly liable where the result of following the plan is necessarily and plainly dangerous and injurious. See *Lacour v. New*

*York*, 3 Duer, 406; *Nevins v. Peoria*, 41 Ill. 502.

<sup>2</sup> 1 Shearm. & Redf. Neg., section 278; *Sutton v. Clarke*, 1 Marsh. 429; *Van Pelt v. Davenport*, 42 Ia. 308, S. C. 20 Am. Rep. 622.

<sup>3</sup> *Cummins v. Seymour*, 79 Ind. 491. In *Gould v. Topeka*, 32 Kan. 485, this presumption was indulged in favor of the action of the city officials in the adoption of a plan, the result being that the city was held liable for negligence in the execution of the work.

<sup>4</sup> *Weightman v. Washington*, 1 Black, 39. See, also, *Seifert v. Brooklyn*, 101 N. Y. 136; *Hardy v. Brooklyn*, 90 N. Y. 435.

<sup>5</sup> *Coster v. Tidewater Co.*, 18 N. J. Eq. 54; *State v. Blake*, 36 N. J. L. 442; *O'Reilly v. Kankakee Co.*, 32 Ind. 169; *Pool v. Trexler*, 76 N. C. 297; *Donnelly v. Decker*, 58 Wis. 461; *Lowell v. Boston*, 111 Mass. 454; *Cooley's Const. Lim.* (5th ed.), 234; *Cooley on Taxation* (2 ed.), 617; *Tideman Police Powers*, 445.

<sup>6</sup> *People v. Nearing*, 27 N. Y. 306; *Matter of Ryers*, 72 N. Y. 1.

that the necessity for its construction may be rested upon the police power.<sup>1</sup> But it is not material to our present purpose to determine to which of the two great governmental powers the authority is referable, for it is enough to affirm that it is a sovereign power which can not be abdicated or surrendered. As it is a sovereign power permanently resident in the State, all persons who acquire a right to use public highways by a grant from a local governmental agency take it subject to the paramount right of the public, for the general weal can not be sacrificed or impaired for private benefit. We know that there are cases which hold that to some extent a local public corporation may so fetter itself by contract as to preclude it from resuming a power it has parted with by contract, but we much doubt the soundness of some of the decisions. At all events, we think it safe to assume that, when the public necessity demands it, a governmental corporation may temporarily interfere with the business of those to whom it has granted the privilege of using the public roads or streets without being compelled to make any compensation. The rule which we approve is illustrated in a case wherein it was held that a city may remove a street railway track in order to construct a sewer.<sup>2</sup> If the question were not so hedged by the decisions we should be strongly inclined to the opinion that in no event can a purely governmental power be lost by contract. The rule as some of the cases declare it should, as we believe, be abridged rather than extended.

<sup>1</sup> *Anderson v. Kerns Draining Co.*, 14 Ind. 199; *Heick v. Voight*, 110 Ind. 279; *Ziggler v. Menges* (Ind.), 22 N. E. 782.      <sup>2</sup> *Kirby v. Citizens St. R. W. Co.*, 48 Md. 168, S. C. 30 Am. R. 455.

## CHAPTER XXII.

### ASSESSMENTS FOR IMPROVEMENTS AND REPAIRS.

The validity of statutes authorizing the assessment of property for the improvement of roads and streets was for a time the subject of much debate, but it is now well established that such statutes do not impinge upon any constitutional provision. The cases upon this subject are numerous and harmonious. It is the generally accepted doctrine that where the expenditure of money is required for the opening, for the improvement, or for the repairing of a road or street, the adjoining land may be assessed when it receives a special benefit, although the public may also be incidentally benefited. It is the theory of many of the authorities that by imposing the expense upon the land specially benefited an equitable adjustment is effected, since those who receive the special benefit are required to do no more than bear a burden correspondent to the actual benefit received. It is but just, it is well reasoned, to compel the land owner who gains by the value added to his land by the improvement to pay that value rather than exact it from those who receive no direct benefit. It detracts nothing from his gain that others also profit by the improvement. There is neither inequality nor injustice in imposing the burden upon those who are directly and especially the gainers by the improvement. It would, of course, be unjust to exact from the land owner the payment of money where he secures no special benefit, although he may obtain, in common with his fellow citizens, a general benefit from the improvement, but the law does not exact money where no equivalent is yielded, for it proceeds upon the theory that a special benefit does accrue to the owner of the land, inasmuch as the value of his property is increased.<sup>1</sup> But

<sup>1</sup> *In re Commissioners of Elizabeth*, 49 N. J. L. 488; *Board v. Fullen*, 111 Ind. 412, 420.

whatever may be the true theory upon which the right to levy local assessments may be vindicated, it is quite well established that the right exists.<sup>1</sup>

A distinction is made between local assessments and taxes levied for general revenue purposes. The question has been before the courts time and time again, and the almost unruffled current of judicial opinion is, that an assessment for a local improvement is not a tax within the meaning of the constitutional provisions requiring uniformity of taxation. Local assessments are not ordinary taxes levied for the purpose of sustaining the government, but they are charges laid upon individual property because the property upon which the burden is imposed receives a special benefit which is different from the general one which the owner enjoys in common with others as a citizen of the commonwealth.<sup>2</sup>

The authority to levy assessments upon property may be delegated to local governmental instrumentalities. The authority, however, is not inherent in any public corporation, but must be directly conferred by statute. It can not be inferred from the general welfare clause of a municipal charter or from similar general provisions.<sup>3</sup> The right to levy local assessments is

<sup>1</sup> 2 Dillon Municipal Corp. (3 ed.), section 761; Cooley's Const. Lim. (5th ed.), 619, and auth. *n*; 1 Hare's Am. Const. Law, 301. A strong illustration of the doctrine that the amount of the assessment is to be determined by the benefit will be found in the case of *Sherwood v. District Judge* (Minn.), 41 N. W. 234.

<sup>2</sup> *Cleveland v. Tripp*, 13 R. I. 50; *Char-nock v. Levee Co.*, 38 La. Ann. 323; *R. & A. R. R. Co. v. City*, 81 Va. 473; *Norfolk City v. Ellis*, 26 Gratt. 224; *McGhee v. Mathis*, 21 Ark. 40; *Emery v. San Francisco*, 28 Cal. 345; *King v. City*, 2 Ore. 146; *Reeves v. Wood Co.*, 8 Ohio St. 333; *Palmyra v. Morton*, 25 Mo. 593; *Willard v. Presbury*, 14 Wall. 676; *People v. Mayor*, 4 N. Y. 419; *Pittsburgh v. Woods*, 44 Pa. St. 113; *Lexington v. McQuillikan*, 9 Dana (Ky.),

514; *State v. Dean*, 3 N. J. L. 335; *Moale v. Baltimore*, 5 Md. 314; *Hines v. Leavenworth*, 3 Kan. 186; *Hurford v. Omaha*, 4 Neb. 336; *Sewall v. St. Paul*, 20 Minn. 511; *Palmer v. Stumph*, 29 Ind. 329.

<sup>3</sup> *Savannah v. Hartridge*, 8 Ga. 23; *City v. Daniel*, 14 Gratt. (Va.) 387; *Lott v. Ross*, 38 Ala. 186; *Kyle v. Mallin*, 8 Ind. 34; *Hare v. Kennerly*, 83 Ala. 608, S. C. 3 S. E. R. 683; *Green v. Ward*, 82 Va. 324; *Mays v. Cincinnati*, 1 Ohio St. 268; *Ashville v. Means*, 7 Ired. (N. C.) Law, 406; *Cincinnati v. Bryson*, 15 Ohio, 625; *Fairfield v. Ratcliff*, 20 Ia. 396; *Chicago v. Wright*, 32 Ill. 192; *Annapolis v. Harwood*, 32 Md. 471; *Leavenworth v. Norton*, 1 Kan. 432; *Winston v. Taylor*, 99 N. C. 210, S. C. 6 S. E. R. 114.

regarded as an extraordinary one, and it can not be deduced from the general words of an act incorporating a municipal corporation, unless the words employed assume to grant, and do clearly grant, that right.<sup>1</sup> The words of a statute assuming to grant the authority to levy local assessments will not be extended by construction, for as against the corporation asserting the authority the construction is strict, and nothing in its favor will be intended except such matters as are clearly implied from the express words of the statute.<sup>2</sup> It is, indeed, the general rule that municipal charters are to be strictly construed, but the rule seems to be even more rigidly enforced in cases where the right to impose a burden upon private individuals is claimed than in cases of a different class, and the courts have sternly kept corporations within the limits of their charter in all cases where a right to levy a special assessment is involved.<sup>3</sup>

The power to levy a local assessment is one of legislative creation, and it can not exist unless there is a valid statute delegating it to the municipality which asserts the right to exercise it.<sup>4</sup> The power is purely a derivative one, and it is not only fettered by all the limitations contained in the statute which delegates it, but it has no existence beyond the scope which a strict construction will yield. It is, therefore, always essential that one who bases a claim upon a local assessment shall show the foundation for his claim to be a valid statute, and that upon a strict construction of that statute against him his claim is within the authority which the statute confers. There is no elasticity in such statutes, and it is beyond the power of the courts to so stretch them as to make them cover cases not fully and clearly within their scope.

Where the statute from which the authority is derived pre-

<sup>1</sup> *Drake v. Phillips*, 40 Ill. 388; *Minn., Railroad Co. v. Alexandria*, 17 Gratt. etc., Co. v. Palmer, 20 Minn. 468. (Va.) 176; *Nelson v. La Porte*, 33 Ind.

<sup>2</sup> *Walker v. District of Columbia*, 12 258; *State v. Hoboken*, 33 N. J. L. Cent. Rep. 408; *City v. Murphy* (Ga.), 280.

3 S. E. Rep. 326. <sup>4</sup> *Matter of Second Ave. Church*, 66

<sup>3</sup> *Reed v. Toledo*, 18 Ohio, 161; *N. Y.* 395; *Griswold v. Pelton*, 34 *Heine v. Levee Com.*, 19 Wall. 655; *Ohio St.* 482; *Niklaus v. Conklin*, 118 *Vance v. Little Rock*, 30 Ark. 439; *Ind.* 289. *Caldwell v. Rupert*, 10 Bush. (Ky.) 182;



scribes the mode in which it shall be exercised, that mode must be pursued. There is here a diversity of opinion, some of the cases going so far as to hold that a literal compliance with the statute is essential, while others hold that a substantial compliance is all that is required. In view of the extraordinary character of the authority, and of the fact that it is a delegated one, the only safe course is to apply the general and long established rule regarding the exercise of naked statutory powers, and require that the mode of exercising it shall be strictly pursued. The mode of exercising the authority is that provided by the statute and no other, for the statute is the sole source of authority.<sup>1</sup> "The mode," it has been said, "constitutes the measure of power."<sup>2</sup> It is undoubtedly true that both upon principle and authority the rule is that the mode prescribed must be closely followed, but it is not meant by this that there should be an exact and literal compliance with the statute, for a failure to literally obey the statute in an entirely immaterial matter will not avoid the proceedings.<sup>3</sup> It is, however, the duty of the courts to resolve doubts against the validity of the exercise of the authority wherever there is any substantial deviation at all, and to sustain proceedings in cases where there is not an exact compliance with the statute only when it clearly and unmistakably appears that no possible injury has resulted to the land owner, or could result to him.

It has been held that provisions of a statute delegating the authority to levy local assessments or taxes may, under the gener-

<sup>1</sup> *Merrit v. Port Chester*, 71 N. Y. 309; *Massing v. Ames*, 37 Wis. 645; *White v. Stevens* (Mich.), 34 N. W. R. 255; *State v. Bayonne*, 49 N. J. L. 311; *Rauch v. City* (Cal.), 22 Pa. Rep. 22; *Newman v. City*, 32 Kan. 456; *City v. Ranken* (Mo.), 9 S. W. Rep. 910; *Sewall v. St. Paul*, 20 Minn. 511; *Bouldin v. Baltimore*, 15 Md. 18; *Chicago v. Wright*, 32 Ill. 192; *Butler v. Nevin*, 88 Ill. 575; *Brophy v. Landman*, 28 Ohio St. 542; *Leach v. Cargill*, 60 Mo. 316; *Allen v. Galveston*, 51 Tex. 302; *Hager v. Burlington*, 42 Ia. 661; *Hur-*

*ford v. Omaha*, 4 Neb. 336; *Lexington v. Headly*, 5 Bush. (Ky.) 508; *Cambria Street*, 75 Pa. St. 357.

<sup>2</sup> *Zottman v. San Francisco*, 20 Cal. 102; *Nicholson Paving Co. v. Painter*, 35 Cal. 699; *Murphy v. Louisville*, 9 Bush. (Ky.) 189.

<sup>3</sup> *State v. South Orange*, 49 N. J. L. 104; *Souther v. South Orange*, 17 Vroom (N. J.), 307; *City v. Sale* (Ill.), 20 N. E. R. 86; *Stebbins v. Kay*, 4 N. Y. Sup. 566; *Jenkins v. Stetler*, 118 Ind. 275; *Lynam v. Anderson*, 9 Neb. 367; *Parish v. Golden*, 35 N. Y. 464.

al rule upon the subject of mandatory and directory statutes,<sup>1</sup> be considered as directory and not mandatory. The doctrine that the courts have a right to disregard the words of a statute upon the ground that they are merely directory is, at best, not easily defended; at all events, it is one that should be cautiously applied to cases where authority to impose a special burden upon the citizens is granted by the legislature. In such cases it is difficult, if not impossible, for the courts to determine what the legislature deemed important, and what immaterial, and the true course would seem to be to regard all the provisions as mandatory.<sup>2</sup> It approaches very near legislation to treat the provisions of a statute as directory in any class of cases, and where the statute is one creating a new right and prescribing a new mode of exercising a right in cases where burdens are compulsorily placed upon individual property, it is delicate work indeed for the courts to treat any provision as merely directory. The analogy between general tax laws and statutes delegating authority to levy local assessments is far from being close. It is, therefore, not just to place assessments for special benefits on the same footing as general taxes, for no land owner can reasonably be held to know that an assessment for special benefits is a burden that he must bear, whereas in the case of tax assessments for revenue purposes every property owner must know, and in legal contemplation he does know, that his land must bear its share of the public burden. The reason for disregarding irregularities in tax assessments is, therefore, very different from that which should be allowed to control in local assessments for special benefits. A citizen must share the general burden, and he should not be relieved from it for any irregularity or error of the assessing or collecting officers, but with respect to a special benefit it is radically different, for that is a burden imposed upon his individual property solely by statute and the assessment is enforceable only in a special statutory proceeding. It will, therefore, lead to error to apply, as has been done, ad-

<sup>1</sup> *Gearhart v. Dixon*, 1 Pa. St. 224, 2  
*Dillon's Municipal Corp.* (3d ed.), section 761.

<sup>2</sup> *Merritt v. Village of Port Chester*,  
 71 N. Y. 309; *Thompson v. Scher-*

*merhorn*, 6 N. Y. 92; *Canbria St.*,  
 75 Pa. St. 357; *State v. Mayor*, 38 N.  
 J. L. 85; *Starr v. Burlington*, 45 Ia. 87;  
*Williamsport v. Kent*, 14 Ind. 306

judications in tax cases to cases of local assessments levied to pay the expense of constructing or repairing a road or street. A provision might with propriety be held directory, when found in a general revenue statute, that in a statute authorizing the levying of local assessments could not, consistently with principle, be regarded otherwise than as mandatory.

The rule that statutes granting the authority to levy special assessments shall be strictly construed does not so limit the authority as to exclude the necessary incidents of the principal power conferred. The construction, while strict, should never be so rigid as to defeat the object sought to be accomplished. The principal authority must, it is true, always be clearly and expressly conferred, but where there is a principal power clearly granted there must be the usual and necessary incidents of that power by implication. It is, of course, not to be expected, indeed, it is scarcely conceivable, that the legislature should, in conferring authority upon local bodies, specify in minute detail the incidents of the power. The courts generally hold that necessary incidental and subordinate powers pass with the grant of the principal power.<sup>1</sup> Any other ruling would make it practically impossible to frame statutes capable of reasonable enforcement. In matters of street improvements and local assessments, as in kindred matters, it is generally held that a power clearly conferred in general words will carry all the incidental authority essential to the execution of the power in the ordinary and appropriate methods. As, for illustration, the grant of authority to pave includes the authority to do all the work, such as curbing, grading, and the like, that is necessary to prepare and fit the street for paving.<sup>2</sup>

The authority to improve a highway is necessarily a continuing one, and is not exhausted by its exercise in one instance, or even in more instances than one. The authority to determine when

<sup>1</sup> *Cone v. Hartford*, 28 Conn. 363; *County v. McCrea*, 93 Ill. 236; *Spaulding v. Lowell*, 23 Pick. 71; *Thompson v. Lee County*, 3 Wall. 327; *Smith v. City*, 7 Ind. 86.  
*Bridgeport v. Railroad Co.*, 15 Conn. 475; *Boston v. Shaw*, 1 Metc. (Mass.), 130; *Fisher v. Harrisburg*, 2 Grant's Cases (Pa.), 291; *State v. Jersey City*, 30 N. J. L. 148; *Smith v. Newbern*, 70 N. C. 14, S. C. 16 Am. Rep. 766; *Cook*

<sup>2</sup> *Schenley v. Com.*, 36 Pa. St. 29; *McNamara v. Estes*, 22 Ia. 246; *Bigelow v. Perth Amboy*, 1 Dutch. (N. J.) 297.

a street should be improved must be lodged somewhere, and it is appropriately lodged with the local authorities. It is quite clear that courts can not, on principle, be invested with the discretionary power of determining when highways should be improved; of necessity, the power must reside in some lawful body, and in no other can it be more appropriately placed than in one selected by, or coming from, the immediate vicinity of the highway which is to be improved. Local officers are nearer the persons and property affected, they have a closer knowledge of the wants of the community, and they are more directly under the supervision of the inhabitants of the locality than other officers, and it is but reasonable to hold, as it is generally held, that they are the exclusive judges of when and in what manner the highway shall be improved.<sup>1</sup> The right of the judiciary to interfere can only exist where there has been fraud or oppression, or some such wrong, constituting a plain abuse of discretion. Where there is a palpable abuse of discretion, then judicial aid may be successfully invoked, but so long as there is no abuse of discretion the courts can not rightfully interfere, even though it may appear that the local authorities have erred in judgment. Any other rule would place power in the judiciary that does not justly belong there, or, viewed from the other side, would leave the way open to gross wrongs on the part of the local authorities. While the courts ought not to surrender all power of review, they should exercise that power only in cases where it clearly and unmistakably appears that there has been an abuse of discretion. We are, it is barely necessary to say, speaking only of reviews in cases where there is jurisdiction, for where there is no jurisdiction a very different rule prevails. It is not essential, it is proper to

<sup>1</sup> *Jelliff v. City of Newark*, 48 N. J. L. 101, S. C. 12 Atl. R. 770; *McKevitt v. Hoboken*, 16 Vroom, 482; *Board v. Fullen*, 111 Ind. 410, 412; *Welch v. Bowen*, 103 Ind. 252; *Goszler v. Georgetown*, 6 Wheat. 593; *Williams v. Detroit*, 2 Mich. 560; *McCormack v. Patchin*, 53 Mo. 33, S. C. 14 Am. Rep. 440; *Gurnee v. Chicago*, 40 Ill. 165; *Municipality v. Dunn*, 10 La. Ann. 57; *In re Burmeister*, 76 N. Y. 174; *Markham v. Mayor*, 23 Ga. 402; *Delphi v. Evans*, 36 Ind. 90, S. C. 10 Am. Rep. 12; *Gall v. Cincinnati*, 18 Ohio St. 563; *Karst v. St. Paul*, 22 Minn. 118; 2 Dillon's Munic. Corp., section 780. *Contra*, *Hammett v. Philadelphia*, 65 Pa. St. 146; *Wistar v. Philadelphia*, 80 Pa. St. 505.

observe, that the statute should expressly provide that the power shall be a continuing one, for, if from the nature of the power granted the courts can justly imply that it is such a power, they will so adjudge. Of course, if the statute by express words, or by clear implication, forbids that inference, then the courts will be compelled to hold that if once exercised it is exhausted. It is obvious that where public corporations are created and invested with authority over highways the implication is that such authority is permanent and continuous, and not intermittent or transient.

As the power to improve streets is a continuing one, and as the grant of this principal power carries necessary incidental powers, it results that streets may be repaved at the expense of the property owners whenever the municipal officers in the exercise of their discretion deem it expedient,<sup>1</sup> but, while this is true, it is also true that where the municipality itself takes up a pavement or disturbs the surface of a street for the purpose of laying gas or water pipes, or for the purpose of constructing a sewer, the cost of repairing the street or replacing the pavement can not be assessed against the property owners.<sup>2</sup> Where the work is simply that of restoring a street to the condition in which it was prior to its disturbance for such purposes as we have indicated, the expense must be paid by the public, but if from use the street becomes unsafe or inconvenient for travel, although the laying of pipes and the construction of sewers may have contributed to that condition, the property owners may be assessed for repairing or repaving.

Where a statute provides generally for the assessment of land for the cost of improving a road or street it authorizes an assessment upon all lands within the limits designated, although some of the property may be exempt from taxation. A statute exempting property from taxation does not exempt it from an assessment for a local improvement.<sup>3</sup> It may, indeed, be

<sup>1</sup> *Sheley v. Detroit*, 45 Mich. 431; etc., *Co. v. People*, 120 Ill. 104, S. C. 11 N. E. 418; *Buffalo Cemetery v. Wilkins v. Detroit*, 46 Mich. 120. Buffalo, 46 N. Y. 506; *Olive Cemetery Co. v. Philadelphia*, 93 Pa. St. 129; *Patterson v. Society*, 24 N. J. L. 385; *State v. Newark*, 27 N. J. 185; *Sheehan v.*

<sup>2</sup> *The City of Burlington v. Palmer*, 67 Ia. 681.

<sup>3</sup> *Illinois Centr. R. R. Co. v. Decatur*, 126 Ill. 92, S. C. 18 N. E. 315; *Chicago,*

doubted whether a statute exempting from local assessment property appropriated to specific uses would be valid, since the exemption of one or more parcels would increase the burden of others owning property along the line of the highway, and this would produce an inequality against which, in many of the States, constitutional provisions are directed. It seems clear, at all events, that in cases where the exemption would so operate as to cast upon the property of other owners an assessment materially beyond the benefit which would accrue, the courts should interfere to prevent the collection of the assessment, since such an assessment could not be upheld without violating the fundamental principle upon which their validity rests, which is, that the special benefit is the equivalent of the special burden.<sup>1</sup>

There may be in existence at the same time two complete and distinct systems of making and enforcing local assessments.<sup>2</sup> There is nothing anomalous in this, for it is not unusual for the legislature to provide different systems for the accomplishment of the same object.<sup>3</sup> Nor is it to be inferred in all cases that a later statute repeals an earlier one on the same subject; on the contrary, the rule is that where there is no repealing clause and there is evidence of an intention found in the words of the later act to construct a new or different system without destroying the old one, both statutes will be upheld and it will be adjudged that the legislature did create a new and different system by the later act.<sup>4</sup>

In some of the States the local authorities are invested with

Good Samaritan, 50 Mo. 155; *Beals v. S. C.* 19 Pacif. 450; *Graham v. Conger*, Rubber Co., 11 R. I. 381; *First Presbyterian Church v. Fort Wayne*, 36 Ind. 85 Ky. 582.  
338; *Trustees v. Ellis*, 38 Ind. 3; *State v. City v. Easterby*, 76 Cal. 222; *Robinson v. Rippey*, 111 Ind. 112.  
Newark, 50 N. J. L. 66, S. C. 11 Atl. Rep. 147; *Agricultural Society v. United States*, 16 Peters, 342, 363; *Davies v. Fairbairn*, 3 How. 636; *Raudebaugh v. Shelly*, 6 Ohio St. 307.  
11 Atl. Rep. 147; *Worcester v. Roosevelt Hospital v. New York*, 84 N. Y. 108; *Harvey v. South Chester*, 99 Pa. St. 565; *Hale v. Kenosha*, 29 Wis. 599; *Allen v. Galveston*, 51 Texas, 302.

<sup>1</sup> *Paulson v. Portland*, 16 Ore. 450,

<sup>2</sup> *Robinson v. Rippey*, 111 Ind. 112; *Ex parte Yerger*, 8 Wall. 85; *Waldo v. Bell*, 13 La. Ann. 329; *Mitchell v. Duncan*, 7 Fla. 13; *State v. Berry*, 12 Ia. 58; *Wilson v. Shorick*, 21 Ia. 332.

power to order an improvement and direct an assessment upon petition, or to so order or direct by a designated vote without a petition, and where this is authorized by statute an assessment directed by the requisite vote will be valid.<sup>1</sup> If the power is conferred and two modes of exercising it are prescribed it will be sufficient to sustain the assessment if it affirmatively appears that it was well exercised in either of the modes prescribed, except, perhaps, where the record shows that the attempt was to exercise it in one of the two modes, and that the attempt was abortive. It is not, as we suppose, necessary that the record should affirmatively show more than a due exercise of the power in a legal mode,<sup>2</sup> for if the power exists and is legally exercised there can be no sufficient reason for denying the validity of the proceedings.

It is, as we have seen, essential to the validity of local assessments that the proceedings should substantially conform to the statute,<sup>3</sup> and where the statute under which the proceedings are commenced remains in force there is no difficulty in ascertaining what law governs, but where the statute is repealed a question of much difficulty arises. The general rule is that the repeal of a statute authorizing the assessment and collection of general taxes sweeps away the taxes unless there is a saving clause, but, as the cases all recognize a difference between assessments and taxes this rule can not, as we believe, apply to local assessments. Nor ought this rule to prevail. Rights are acquired in such case by the contractor and by the property owners which should not be impaired by subsequent legislation. It is, perhaps, not easy to state any general principle which will uphold proceedings under a statute subsequently repealed in cases where the work was begun prior to the repeal, but such proceedings were upheld in a case decided by the Supreme Court of Ohio upon the ground that vested rights were acquired which

<sup>1</sup> *City of Indianapolis v. Mansur*, 15 Ind. 112. petition, no other can be rightfully pursued. *Rector v. Board*, 50 Ark. 116, S. C. 6 S. W. 519.

<sup>2</sup> *Wren v. City*, 96 Ind. 206, 217. Where, however, one mode only is prescribed and that requires a vote on <sup>3</sup> *State v. City of Hoboken*, 51 N. J. L. 267, S. C. 17 Atl. R. 110.

it was not in the power of the legislature to divest.<sup>1</sup> In other cases it is held that the repealing statute will be so construed as not to affect contracts entered into prior to its enactment.<sup>2</sup> It is true that, under the decisions of the Supreme Court of the United States and of the State courts generally, the legislature may change the remedy, but we do not believe that this general doctrine extends so far as to leave a contractor, who has done work upon the faith of the liability of adjoining property to assessment, without remedy. His rights, as it seems to us, are so far in the nature of vested rights as to be entitled to the protection of the constitutional provision.<sup>3</sup>

Property owners can not defeat an assessment upon the ground that the local authorities have disobeyed the law where the wrong affects others and does not directly affect the regularity of the proceedings. In order to entitle the property owners assessed to complain it must appear that the wrong prejudices their rights, it is not enough that it should appear prejudicial to the rights of other persons. Thus, it is held that, although it is an actionable trespass on the part of the local authorities to go upon adjoining land and carry away soil or gravel to be used in improving or repairing a street, the wrong on the part of these authorities will not avail a property owner to defeat an assessment.<sup>4</sup> In another case it was held that the validity of a provision in an ordinance conferring upon the contractor the right to take surplus earth could not be tried in an action to enforce the collection of the assessment.<sup>5</sup> The general rule we have stated is not without limitations, and, perhaps, not with-

<sup>1</sup>*City of Cincinnati v. Seasingood* (Ohio), 21 N. E. Rep. 630.

<sup>2</sup>*Houston v. McKenna*, 22 Cal. 550; *Douglass v. Cincinnati*, 29 Ohio St. 165; *Spangler v. Cleveland*, 35 Ohio St. 469; *Niklaus v. Conkling*, 118 Ind. 289.

<sup>3</sup>An interesting and instructive discussion of the general doctrine of the power of the legislature to change the remedy will be found in *Black's Constitutional Prohibitions*, sections 135, 143.

<sup>4</sup>*Moore v. City of Albany*, 98 N. Y. 396.

<sup>5</sup>*Jenkins v. Stetler*, 118 Ind. 275; *Sims v. Hines* (Ind.), 23 N. E. R. 515. In accordance with this general doctrine it is held that an owner can not successfully insist that the land for the street has not been condemned. *Jackson v. Smith* (Ind.), 22 N. E. 431; *Holmes v. Village of Hyde Park*, 121 Ill. 128, S. C. 13 N. E. R. 540; *Village of Hyde Park v. Borden*, 94 Ill. 26.



out exceptions. If the matter which affects persons other than the property owners assessed is of such a character as to render it legally impossible to make the improvement, then, as we suppose, the property owner might, by seasonable and proper steps, make it available against the assessment. If, for instance, the property owner should be able to show that the local authorities were attempting to construct a road or street over property where they had neither acquired, nor could lawfully acquire the right to lay out a road or street, he might, if he moved in time and in an appropriate way, prevent the enforcement of the assessment against his property. But if he should delay until after the work has been done, he could not succeed, since he would not be permitted, after having slept upon his rights, to prejudice the interest of others who had acted in good faith by challenging the regularity of the proceeding.<sup>1</sup>

In cities and towns the general rule is that the proceedings must be founded upon an ordinance, resolution, or order of the governing body.<sup>2</sup> Where an ordinance is not required by the statute which delegates the authority a resolution may be sufficient,<sup>3</sup> but it would seem better in all cases to require a measure of a higher nature, and an ordinance is much more than a mere resolution.<sup>4</sup> Whatever form the measure may assume it must be positive and definite, a mere expression of a wish or opinion is not enough.<sup>5</sup> It is essential that the ordinance or resolution should definitely provide for the improvement, although it need not go into details, for in making the improvement the provisions of the ordinance or resolution must

<sup>1</sup> *St. Louis v. Excelsior Brewing Co.*, 96 Mo. 677, S. C. 10 S. W. R. 477; *Martin v. Carron*, 26 N. J. L. 228; *Ritchie v. South Topeka*, 38 Kan. 368, S. C. 16 Pac. 332; *Holmes v. Hyde Park*, 121 Ill. 128; *Village of Hyde Park v. Borden*, 94 Ill. 26.

<sup>2</sup> *Newman v. City of Emporia*, 32 Kan. 456. It is held in *Nevin v. Roach*, 86 Ky. 492, S. C. 5 S. W. 546, that the ordinance need not be spread on record, but this

can not be correct in jurisdictions where the statute requires ordinances to be recorded.

<sup>3</sup> *Emery v. San Francisco*, 28 Cal. 375; *Harney v. Heller*, 47 Cal. 17; *Indianapolis v. Imbery*, 17 Ind. 175; *Mobery v. Jeffersonville*, 38 Ind. 198.

<sup>4</sup> *Citizens, etc., Co. v. Town of Ellwood*, 114 Ind. 332.

<sup>5</sup> *Stockton v. Cramer*, 45 Cal. 643; *Merrill v. Abbott*, 62 Ind. 550.

be pursued with strictness.<sup>1</sup> The ordinance or resolution is the foundation of the proceedings in so far, at least, as their general character and extent are concerned, and if it is so vague and indefinite as to be incapable of being carried into execution, it must, it is obvious, be adjudged insufficient. If, however, it can be fairly and reasonably executed by the usual and appropriate methods, it should not, as it seems to us, be declared wholly ineffective. The law presumes here, as elsewhere, that it is not necessary in every enactment of a legislative character to enter so fully into details as to make a complete system without the aid of other laws, or the employment of the ordinary and appropriate means necessary to effectuate the principal purpose. To require this would be to require a prolixity of detail that would create confusion and produce harm rather than good.

The general rule is that a municipal legislature can not delegate its powers, and this rule requires that the body having the authority to order the improvement shall itself designate and describe the improvement. In one case this rule was unreasonably extended, and an ordinance condemned that, upon principle and authority, should have been sustained.<sup>2</sup> It is undoubtedly true, that the authority to designate the particular improvement can not be delegated, but it is also true that the details of the improvement need not be specifically set forth; if it were otherwise, then every material that enters into the work must be described in detail and so must be the manner of its preparation. It is enough to describe, in terms sufficiently certain to designate and identify the place where the improvement is to be made, the kind of improvement, its general character and its extent.<sup>3</sup>

Where the ordinance or resolution so fully describes the im-

<sup>1</sup> *People v. Clark*, 47 Cal. 456; *Hamelman v. McCrery*, 51 Cal. 563; *Andrew v. City*, 57 Ill. 239.

<sup>2</sup> *Smith v. Duncan*, 77 Ind. 92. The case of *City v. Clemens*, 43 Mo. 395, does not support the decision in the case cited, for there the improvement was not described so as to comply with the statute.

<sup>3</sup> *Merrill v. Abbott*, 62 Ind. 549; *Faber v. Grafmiller*, 109 Ind. 206; *Wren v. City*, 96 Ind. 206, 218; *Ross v. Stackhouse*, 114 Ind. 200; *Jacksonville v. Jacksonville R. R.*, 114 Ill. 562; *Main v. City (Ark.)*, 5 S. W. Rep. 801; *Sims v. Hines (Ind.)*, 23 N. E. R. 515.

provement as to give adequate information to bidders and to property owners of the nature, extent and locality of the improvement, there is no delegation of authority although the control of the work and some of the details are committed to other municipal officers.<sup>1</sup> It is not necessary that any legislative enactment should be self-executing, nor is it necessary that it should be capable of enforcement without the assistance of other than legislative officers. What is required, and all that can justly be required, is that the ordinance or resolution shall with reasonable certainty—such certainty as will convey adequate information—prescribe a rule that will fully guide those who are to execute it, and give those interested fair notice of how it is to operate, upon what subject, and to what extent. If it does this, there is no delegation of legislative authority, although ministerial duties are left to be discharged by ministerial officers. Where the legislative power is fully exercised nothing remains for delegation, and it is fully exercised where there is a rule prescribed of such certainty that it can be executed without difficulty by ministerial officers, and in such a manner as to effect the legislative intention. The legislative duty is fully discharged when a definite order is made and a reasonably certain rule declared.

An ordinance or resolution must be enacted in the manner prescribed by the statute, and where a designated vote is required to enact such measures, an ordinance, or a resolution, not passed by the required vote may be avoided in a proper proceeding.<sup>2</sup> Where the statute requires that the ordinance shall be put in force in a specified mode, the command of the statute must be obeyed or the ordinance will fall before a direct

<sup>1</sup> *Ray v. City*, 90 Ind. 567. In *Hitchcock v. Galveston*, 96 U. S. 341, it was said. "We spend no time in vindicating this proposition. It is true the council could not delegate all the power conferred upon it by the legislature, but like every corporation it could do its work by ministerial agents." *Green v.*

*Ward*, 82 Va. 324; *Bertram v. Bridgeport*, 55 Conn. 122.

<sup>2</sup> *Logansport v. Legg*, 20 Ind. 315; *Price v. Railroad Co.*, 13 Ind. 58; 1 *Dillon's Municipal Corp.* (3d ed.), sections 291, 292. Where a majority vote is required a majority of a legal quorum is sufficient. *Rushville, etc., Co. v. City of Rushville (Ind.)*, 23 N. E. R. 72.

assault.<sup>1</sup> It is a settled rule, evident from its bare statement, that where a petition is required the proceedings may be avoided if none is filed.<sup>2</sup> Where, however, there is a petition not plainly insufficient on its face, but sufficient in form and substance to require a judgment upon its sufficiency, the judgment, whether formally expressed or not, will uphold the proceedings as against a collateral attack made after the work has been completed.<sup>3</sup> If there is no statute precluding an attack upon the proceedings prior to a designated stage, the sufficiency of the petition may be considered and reviewed in a proper proceeding, and if found insufficient the proceedings of the assessing officers will fail, provided no element of estoppel or waiver enters into the case. The same rule will prevail where preliminary surveys, estimates or the like are required by the statute as a condition precedent to the right to order the improvement and direct the assessment.<sup>4</sup> It is not necessary that there should be a preliminary estimate of the cost of the improvement unless the statute requires it.<sup>5</sup> If the statute requires that improvements shall be made according to a general plan, or according to an established grade, it is necessary that there should be a plan or such a grade; but a plan may be adopted or a grade established without any formal ordinance,<sup>6</sup> unless the statute otherwise provides. Where the statute prescribes the manner in which all "ordinances, by-laws and regulations" shall be put in force, an order or resolution establishing the grade of a street is ineffective unless put in force as the statute

<sup>1</sup> *Dennison v. Kansas City*, 95 Mo. 416; *Meyer v. Fromm*, 108 Ind. 208; *In re Douglass*, 46 N. Y. 42; *In re Anderson*, 60 N. Y. 457.

<sup>2</sup> In the absence of a statute requiring a vote or petition, the whole matter is committed to the discretion of the municipality. *Barber, etc., Co. v. Gogreve* (La.), 5 S. R. 848.

<sup>3</sup> *Wright v. Tacoma*, 3 Wash. Ter. 410, S. C. 19 Pac. R. 42.

<sup>4</sup> *In re Garvey*, 77 N. Y. 523; *Frosh v. Galveston* (Tex.), 11 S. W. R. 402; *Brady v. King*, 53 Cal. 44; *Dyer v. Heydenfeldt*, 4 West Coast Rep. 585.

<sup>5</sup> *Wetmore v. Campbell*, 2 Sandf. 341; *Laimbeer v. Mayor*, 4 Sandf. 109; *Manice v. New York*, 4 Seld. 120. But it is otherwise where it is required by statute. *Frosh v. Galveston* (Tex.), 11 S. W. R. 402. The grade should be fixed. *Dorland v. Bergson* (Cal.), 21 Pac. R. 537. It can only be changed by the body to whom the statute grants the power. *Larned v. Briscoe*, 62 Mich. 393.

<sup>6</sup> *City v. Fox*, 78 Ind. 1; *Mattingly v. City*, 100 Ind. 545.

requires.<sup>1</sup> Provisions in the nature of conditions precedent to the right to order the improvement and direct an assessment must be strictly obeyed or the proceedings will be adjudged invalid when properly brought before the court for review.<sup>2</sup> Thus, if the statute requires that, before the ordinance is passed the matter shall be referred to designated officers, it must be so referred, and it is not sufficient to refer it to a part only of the officers designated, it must be submitted to all.<sup>2</sup> In many instances these conditions are held to be jurisdictional, and the failure to perform them is adjudged to render the proceedings absolutely void.<sup>3</sup> We venture to suggest that in some of the cases the courts have erred in pronouncing the proceedings absolutely void, and that in others where the attack was direct they erred in doing more than declaring the proceedings to be erroneous. If proceedings are entirely without or beyond the authority of the tribunal, then they are, of course, absolutely void, but where they are not beyond the scope of the jurisdiction of the court they are simply voidable. It is, therefore, by no means every deviation from the provisions of the statute respecting conditions precedent to the exercise of the power that can justly be said to render the proceedings absolutely void. If they are absolutely void then they can not be ratified, nor can a "standing by" estop the land owner, for a void thing is as a thing that never existed, and yet it is the almost uniform ruling of the courts that such proceedings may be enforced where the property owner by his conduct ratifies them or estops himself from contesting their validity. There may be grave errors and irregularities and yet the proceedings may not be utterly destitute of validity.

An order, ordinance or resolution may well be deemed nec-

<sup>1</sup> *Meyer v. Fromm*, 108 Ind. 208.

<sup>2</sup> *State v. Bayonne*, 49 N. J. L. 311; *Worthington v. Covington*, 82 Ky. 265.

<sup>3</sup> *Worthington v. Covington*, *supra*; *Starr v. Burlington*, 45 Ia. 87; *Dyer v. Miller*, 58 Cal. 805; *Henderson v. Baltimore*, 8 Md. 352; *Holland v. Baltimore*, 11 Md. 186; *Welsford v. Weid-*

*lin*, 23 Kan. 601; *Litchfield v. Vernon*, 41 N. Y. 123; *Miller v. Mobile*, 47 Ala. 163, S. C. 11 Am. Rep. 768; *Wells v. Burnham*, 20 Wis. 112; *Daniel v. New Orleans*, 26 La. Ann. 1; *Pittsburgh v. Walter*, 69 Pa. St. 365; *In re Sharp*, 56 N. Y. 257; *City of Delphi v. Evans*, 36 Ind. 90.

essary as a jurisdictional matter. It is evident that the property owners would have no opportunity of contesting the assessment unless there was some initiatory order upon which the proceeding could be founded, and without such an opportunity we very much doubt whether an assessment could be upheld. Certainly, such an order is essential where the statute requires it, and without it there is no foundation for the proceedings. It serves the same purpose as a petition or application, and is, as we believe, essential to invoke and call into exercise the jurisdiction of the local body. If there is no such order, there can, as we conceive, be no jurisdiction. It may, perhaps, not be necessary to confer jurisdiction that the order should conform in all respects to the statute, but it is necessary that there should, at least, be some order assuming to be such as the statute requires.

It is not necessary, unless required by the statute, to state in a resolution or ordinance directing the improvement of a street, and providing for an assessment, that the improvement is necessary. Where the judgment of the common council of a municipal corporation that an improvement is necessary is involved in its order directing the improvement, the order, resolution or ordinance need not set forth the grounds upon which the council proceeds.<sup>1</sup> The adoption of the order, resolution or ordinance is a sufficient declaration of the necessity for the improvement. If, however, the statute specifically requires that the resolution or ordinance should state the grounds upon which the local authorities proceed, they must be set forth, or the proceedings will fall before a direct attack.<sup>2</sup> In the case referred to in the note the question was carefully considered, and it was held that where the statute provided that "whenever the common council shall deem any such improvement necessary they shall so declare by resolution, which resolution shall be drawn by the attorney of the corporation, and shall

<sup>1</sup> *Stuyvesant v. Mayor, etc.*, 7 Cowen, 588; *Young v. St. Louis*, 47 Mo. 492; *Kiley v. Forsee*, 57 Mo. 390; *Platter v. Board of Comm'rs*, 103 Ind. 360; *Jackson v. State*, 104 Ind. 516, 520; *Board of Comm'rs v. Hall*, 70 Ind. 469; *Grier-son v. Ontario*, 9 Upper Can. Q. B. 623; *Fisher v. Vaughan*, 10 Upper Can. Q. B. 492. See *State v. Jersey City*, 27 N. J. L. 493.

<sup>2</sup> *Hoyt v. City of Saginaw*, 19 Mich. 39, S. C. 2 Am. R. 76.

describe the contemplated improvement," it was essential that the resolution should declare that the improvement was necessary.<sup>1</sup>

Courts have been influenced in many instances by the desire to prevent the land owner from loss by the sacrifice of his property at a forced sale made in enforcing the collection of a local assessment, and, controlled by this purpose—a just and commendable one—have, as we believe, in some instances carried the doctrine that irregularities vitiate the assessment too far. There is reason for discriminating between cases where the question is whether the title shall be lost, and cases where the question is whether the assessment shall be paid. It is now generally held in tax assessments that irregularities will prevent a purchaser at a tax sale from acquiring title, but that the owner must, nevertheless, pay the assessment. He must do equity by tendering the amount of the assessment levied upon his property, in all cases where his property is liable to taxation. The rule can not, it is evident, be strictly applied to local assessments, since there is an obvious difference between

<sup>1</sup> In the case referred to the defect in the resolution was held to be jurisdictional, and the collection of the assessment was enjoined. No question of estoppel or waiver was made, and there was, of course, no decision upon those questions, but if the defect was, in a strict sense, jurisdictional, it may well be doubted whether there could be an estoppel or a waiver. In *Hewes v. Reis*, 40 Cal. 255, a very strict rule is laid down, the court saying: "All the requirements of the statute must be complied with or the tax can not be collected." This is a broad statement of the rule, and we are inclined to believe that it can only be correct, if at all, in a case where the validity of the assessment is questioned by a direct attack. If this be not true, then it must be true that one who collaterally assails the proceedings will fare as well as one who directly attacks them, and this is

not consistent with principle. See, however, *Taylor v. Palmer*, 31 Cal. 241; *Chambers v. Satterlee*, 40 Cal. 497; *Creighton v. Manson*, 27 Cal. 614; *Zottman v. City of San Francisco*, 20 Cal. 96; *Mayo v. Haynie*, 50 Cal. 70; *Turrill v. Grattan*, 52 Cal. 97. In the case of *Smith v. City of Toledo*, 24 Ohio St. 126, it was held that where the statute requires the adoption of a preliminary resolution the failure to pass it invalidates the proceedings. A similar ruling was made in *Welker v. Potter*, 18 Ohio St. 85. But in these cases the court rested its decision upon the peculiar provisions of the statute. While we are satisfied that there must be some order, ordinance or resolution in the nature of a petition or application, we very much doubt whether the failure to adopt a subsequent resolution would render the proceedings void, although it might make them erroneous.

general revenue taxes and local assessments, but the principle which undergirds the rule may, with reason and justice, be applied in many cases of local assessments where the controversy arises after the work has been completed. Excluding from consideration the question of estoppel and considering the question on other grounds, there is much that may be said in support of the opinion that courts should discriminate between the two classes of cases, and be slow to pronounce proceedings absolutely void in that class wherein the only question is whether the land owner shall escape the payment of the benefits assessed against his property. If it clearly appears that the property is liable to assessment, that there is a statute conferring authority to order local assessments, that the proper officers assumed to conduct the proceedings under the statute, that they took some steps essential to secure jurisdiction in the particular instance, and that the land was actually benefited, common justice would seem to require that the owner should not be relieved from the assessment by a judgment declaring the whole proceedings void; at all events, where such a case is presented it should not be brought under the rigid rule that applies in cases where title is asserted on tax sales. To hold the proceedings utterly void is to suffer the land owner to acquire property without paying anything for it. A benefit is property of value. If a benefit is not property, then the whole system of local assessments rests on an insecure foundation and must eventually fall, for if there is nothing of value constituting an equivalent for the money exacted from the land owner there would be a palpable violation of the constitutional provision forbidding the taking of private property without compensation. But a benefit (employing the term "benefit," in the peculiar sense affixed to it in matters of local assessments) is intrinsically property, because it is a betterment of the land. It is as much property as the claim of one who builds a roadway, or digs a ditch on the land of another, thereby improving and bettering it. To the extent that the improvement is a betterment, that is, a substantial and material addition to the land, the owner receives a thing of actual and substantial value, and for it he should be compelled to pay unless there are valid and material reasons



warranting his release from this duty. The courts ought not to seize upon unimportant matters to relieve him by declaring the proceedings utterly void, and it will many times bring unjust results to strictly apply the rules which obtain in cases where title to the land itself is in issue. While we are far from affirming that proceedings should be upheld in every case where the sole question is the right to collect the assessment, and the statute is not strictly pursued, we do affirm that the same irregularities which will avoid a sale ought not always to completely destroy the assessment. While there are no decisions that have come to our notice which fully and expressly declare the doctrine we have asserted, there are some which, if carried to their logical result, do support it.<sup>1</sup> In some of the cases we have cited, the reasoning of the court sustains our view, in others the rule that where some part of the assessment is valid, the part that is valid must be tendered is approved, and in others departures from the statute are held not to render the proceedings void, and none of these rulings can be correct if the same rule applies that prevails where title is directly in issue, for less important matters than those adjudged not to invalidate such assessments will, as is everywhere agreed, prevent the acquisition of title. An infirmity in some of the decisions is, as we conceive, mainly attributable to the fact that the distinction between voidable and void proceedings is lost sight of, and this infirmity reaches so far as to completely destroy the authority of the cases.

While the order for the improvement of a street, whatever may be its form, must be adopted, recorded, and authenticated in the mode prescribed by statute,<sup>2</sup> nevertheless, it is not essen-

<sup>1</sup> Jackson v. Smith (Ind.), 22 N. E. R. 431; Cincinnati v. Anchor White Lead Co., 44 Ohio St. 243; Montgomery v. Wasem, 116 Ind. 343, *vide op. p.* 355; Prezinger v. Harness, 114 Ind. 491; Cauldwell v. Curry, 93 Ind. 363; *Ex parte* Johnson, 103 N. Y. 260; Pittsburgh's Appeal, 118 Pa. St. 458; Mills v. Charlton, 29 Wis. 400; Morrell v. Union Drainage District, 118 Ill. 139; Foley v. Haverhill, 144 Mass. 352; City of Elkhart v. Wickwire (Ind.), 22 N. E. R. 302; City of Indianapolis v. Gilmore, 30 Ind. 414.

<sup>2</sup> Chamberlain v. Cleveland, 34 Ohio St. 551; Matter of Metropolitan Gas Light Co., 85 N. Y. 526; Petition of De Pierris, 82 N. Y. 243, explaining *In re* Conway, 62 N. Y. 504; Churchman v. City, 110 Ind. 260; Danville v. Shelton, 76 Va. 325; State v. Newark, 25 N. J. L. 399.

tial to its validity that the rules of parliamentary or legislative assemblies should be strictly obeyed in adopting it, or that it should have been passed in conformity to the rules adopted by the municipal body for its own government.<sup>1</sup> Where, however, these rules extend beyond the mere mode of legislative procedure and are such as property owners may rely upon, we suppose that the general rule declared in the case cited would not apply; as, for instance, if the legislative body of the municipality should adopt a rule that no ordinance or resolution should be considered until after the publication of notice. It is not always necessary that the record should formally show a strict compliance with the statute, since, if that fairly and reasonably appears, although not in full and accurate form, it will be sufficient.<sup>2</sup> The order must, of course, be made at a legal meeting of the body having authority to make it, and where the times of meeting are fixed by law, then the meetings must be held at such times, but if not so fixed, the body may itself designate the times for its meetings.<sup>3</sup> Under the authority of the decision referred to on a prior page,<sup>4</sup> a rule of the local body requiring a suspension of the rules may be annulled by the body itself, but where the statute contains a provision on the subject there must be a compliance with it. Where the statute requires different readings of an ordinance it is mandatory.<sup>5</sup> A departure from any statutory provision should, as a general rule, be considered as sufficient to destroy the order in all cases where the attack is directly and seasonably made and the case is not affected by any question of waiver or estoppel.

It is only such improvements as are authorized by statute that

<sup>1</sup> *Holt v. Somerville*, 127 Mass. 408.

<sup>2</sup> *Lexington v. Headly*, 5 Bush. 508.

<sup>3</sup> *Oakland v. Carpentier*, 13 Cal. 540.

<sup>4</sup> *Holt v. Somerville*, 127 Mass. 408.

<sup>5</sup> *Cutcomb v. Utt*, 60 Ia. 156; *State v. Newark*, 30 N. J. Law, 303; *Weill v. Kenfield*, 54 Cal. 111. The case of *Barton v. Pittsburgh*, 4 Brewster, 373, can not be supported in assessment cases if, indeed, it can be in any others. There is some conflict in the authorities as to when the provisions of a statute con-

cerning the adoption of ordinances shall be considered mandatory and when directory, but we believe the only safe rule in assessment cases is to consider all such provisions mandatory unless there is an exceedingly strong reason for holding them to be directory. *Morrison v. City*, 98 Mass. 219; *Mayhew v. District, etc.*, 13 Allen, 129; *Steckert v. City*, 22 Mich. 104; *City of Delphi v. Evans*, 36 Ind. 90; *City v. Crockett*, 46 Ind. 319.

can be made at the expense of the property owners. It is seldom that the statute specifically describes the improvement, for general terms are usually employed. Where there is no specification of the kind of improvement that the local authorities may make, they are invested with a discretion and their judgment as to what it shall be is conclusive. Where general authority to improve is expressly conferred, all incidents necessary to carry the authority into execution are implied. The familiar rule, that the grant of a principal power carries by implication all the incidental powers necessary to effectuate it, applies, as we have seen, to such statutes, but, it is to be noted, there must always be a clear and express grant of the principal power; neither in whole nor in part can that be implied. Where a power to make a designated improvement is conferred, all that is necessary to make the improvement is implied. Thus, where authority is granted to pave a street, if it be necessary to construct gutters, put in curbstones, or do any other work of like character, the corporation may order it done at the expense of the property owners, although the statute does not mention such matters.<sup>1</sup>

It is only such property as the statute authorizes the local authorities to lay an assessment upon that can be made liable for the expense of constructing, improving or repairing a road or street. It is not within the authority of the local or municipal officers to assess property not made subject to assessment by statute, nor can they assess more property than the statute authorizes.<sup>2</sup> Whatever part of a citizen's property the statute makes liable to the assessment, and no more, may be made to bear the expense of the improvement. It is easy to state the general rule, and when stated its soundness is obvious, but it is not always easy to determine what property, or rather how much property, may be made liable. It has been held that where the expense is to be assessed "in proportion to the frontage," the proper course is to ascertain the entire expense and charge it

<sup>1</sup>O'Leary v. How, 7 La. Ann. 25; Schenely v. Com. 36 Pa. St. 29; Williams v. Detroit, 2 Mich. 560; Dean v. Borchesnius, 30 Wis. 236.

<sup>2</sup>Griswold v. Pelton, 34 Ohio St. 482; Niklaus v. Conkling, 118 Ind. 289.

upon each lot in the proportion that its frontage bears to that of all the lots fronting on the street improved.<sup>1</sup> This is undoubtedly the correct rule. In cases where the statute makes the frontage assessable, a lot which fronts on a street different from that improved can not, it has been held, be charged, although the rear part may abut on the street improved.<sup>2</sup> Where, however, lots have a double frontage, as corner lots are generally held to have, both fronts may be assessed.<sup>3</sup> Authority to assess adjoining lots will not warrant an assessment upon adjacent lots.<sup>4</sup> Where the legislature expressly authorizes it, districts may be laid out and property within them assessed, although it may not adjoin the street improved or repaired. How far the legislature may go in this direction it is, perhaps, not possible to say in the present condition of the decisions, but this much may be safely said, that it can not assess where the improvement does not confer some benefit upon the land. Here, again, arises a difficult question, and that is this: By what authority, judicial or legislative, shall it be determined that land within a given district is benefited? As it is only upon the theory that property is specially benefited that special assessments can be levied, it would seem that there must be some limit to the power, but what the limit is can not be satisfactorily determined until more light is shed upon the question. The authority to determine whether an improvement of a street will benefit adjoining lands is generally held to be a question for decision by the local authorities, and their decision is usually held to be conclusive, but when the legislature stretches out its authority so as to include distant lots or lands, it may well be doubted whether it can arbitrarily decide, or authorize local officers to conclusively decide, that the distant property is benefited to the extent of the special assessment. Indeed, it may well be doubted whether,

<sup>1</sup> *Neeman v. Smith*, 50 Mo. 525; *St. Louis v. Clements*, 49 Mo. 552; *Neeman v. Smith*, 60 Mo. 292.

<sup>2</sup> *Philadelphia v. Eastwick*, 35 Pa. St. 75.

<sup>3</sup> *Wolf v. Keokuk*, 48 Ia. 129; *Morrison v. Hershire*, 32 Ia. 271; *City of Springfield v. Green*, 120 Ill. 269.

<sup>4</sup> *In re Ward*, 52 N. Y. 395; *Pound*

*v. Plumstead Board of Public Works*, L. R. 7 Q. B. 183. See, also, as to the distinction between *adjoining* and *adjacent*. *Henderson v. Long*, 1 Cooke (Tenn.), 128; *U. S. v. Northern Pac. R. R.*, 29 Alb. L. J. 24; *Holmes v. Carley*, 31 N. Y. 289; *Truax v. Pool*, 46 Ia. 256; *Akers v. U. N. J. R. R. Co.*, 43 N. J. L. 110.

on principle, it can arbitrarily decide the question in any case. We do not doubt that, under the authorities, an assessment may be made on land distant from the street improved, wherever an opportunity is allowed to contest the question before a judicial tribunal.<sup>1</sup> The question upon which we express a doubt is whether, considering the question solely on principle, the legislature can arbitrarily decide, or invest local officers with the authority to arbitrarily decide, what property is benefited by the improvement. Where the property fronts on the street improved then it is possible that it may be said as matter of law that it is benefited to the extent of the expense of the improvement, and on this assumption, assessments on frontage may be sustained on principle. If Judge Holmes is right in saying that law is founded on experience and not logic, then the apportionment by frontage may be sustained on the ground that any other mode would be impracticable. Courts should look to consequences, and the consequences of leaving assessments to the judgment of different tribunals would probably result in greater inequality than if the rule of apportionment were directly established by an arbitrary legislative decision. There is, however, infinitely more difficulty when the authority to conclusively decide, is extended so as to affect property not abutting on the road or street, for what possible standard can there be for determining the extent of the right to assess except that of actual benefits, and how is it possible to ascertain what the benefit is unless there is a judicial investigation? If the power to decide is wholly legislative, as some of the decisions intimate, then it is beyond control and courts can not interfere upon any pretext. The concession that the power to decide what property shall be benefited and how the apportionment shall be made is legislative, leads to the absolute exclusion of the judiciary, for, if the power is purely legislative, courts have not the semblance of right to pass upon the justice, equity, or reasonableness of the legislative decision. No matter how monstrous it may be, it must stand undisturbed, for the power to decide legislative questions rests solely in the legislative body. For our part we very much

<sup>1</sup> *Kennard v. Morgan*, 92 U. S. 480; *Davidson v. New Orleans*, 96 U. S. 97; *People v. Mayor*, 4 N. Y. 419.

doubt whether in any case the right of arbitrary decision by the legislature can be defended on strict principle, and we can not forbear suggesting that the judiciary ought not, and, in truth, can not, surrender its power to decide questions affecting the right to impose special burdens on private property. Special assessments for local improvements differ essentially from assessments for general revenue purposes. The matter of levying taxes for general revenue is exclusively legislative, and is fettered only by the limitations of the constitution, whereas the legislative power to exact a special tax from a property owner rests upon the fact that there is a betterment of his property to the extent of the cost of the improvement. The distinction between assessments for general revenue purposes and special assessments for local improvements, is suggested by the Supreme Court of the United States in a late case, and the reasoning of that case goes far in the direction we have suggested to be the true one.<sup>1</sup>

The weight of authority, however, is overwhelmingly in favor of the right of the legislature to determine what property shall be assessed and how the apportionment shall be made.<sup>2</sup> According to the rule generally laid down, no question can be litigated involving the decision of the legislature, or the local authorities upon whom the power to decide has been conferred, concerning the apportionment of the expense; all that is open to investigation is the mode of procedure and the manner of performing the work. Some of the courts have, however, held that an

<sup>1</sup> *Hagar v. Reclamation Dis.*, 111 U. S. 701. See, also, *Parkland v. Gains* (Ky.), 11 S. W. R. 649; *Conger v. Graham* (Ky.), 11 S. W. R. 467.

<sup>2</sup> *Williams v. Detroit*, 2 Mich. 560; *Motz v. City*, 18 Mich. 495; *Sheley v. Detroit*, 45 Mich. 431; *Lafayette v. Fowler*, 34 Ind. 140; *Cody v. Ft. Wayne*, 43 Ind. 197; *Ex parte Mayor*, 23 Wend. 277; *Com. v. Woods*, 44 Pa. St. 113; *Cook v. Slocum*, 27 Minn. 509; *Northern Indiana R. R. Co. v. Connelly*, 10 Ohio St. 159; *Joseph v. O'Donoghue*, 31 Mo. 345; *Burnett v. Sacramento*, 12 Cal. 76; *Hines v. Leavenworth*, 3 Kan. 186; *Parker v. Challiss*, 9 Kan. 155; *Warren v. Henly*, 31 Ia. 31; *Weeks v. Henly*, 10 Wis. 258; *McGonigle v. Allegheny City*, 44 Pa. St. 118; *State v. Fuller*, 34 N. J. L. 227; *White v. People*, 94 Ill. 604; *Whiting v. Townsend*, 57 Cal. 515; *Baltimore, etc., v. Johns Hopkins Hospital*, 56 Md. 1, overruling *Baltimore v. Scharf*, 54 Md. 499; *Ludlow v. Trustees*, 78 Ky. 357; *Terry v. Hartford*, 39 Conn. 291.

assessment upon the basis of frontage is invalid.<sup>1</sup> Other courts, while conceding that a frontage or a district assessment arbitrarily decided upon may be valid, declare that if it clearly appears that it is one that can not possibly be just, it will be set aside.<sup>2</sup> In other cases there appears to be a modified form of the general doctrine, and the ruling is, that the decision of the legislature, or of the local officers to whom the authority is delegated, is, in general, valid, but not invariably beyond review by the judiciary.<sup>3</sup> It may not be out of place to say, in passing, that the doctrine asserted in cases of the latter class is not easily vindicated on principle, since if it be once granted that the question is legislative, then it is no concern of the courts, for whether the decision be right or wrong, just or unjust, the legislative judgment is beyond judicial supervision.

So far as it is in the power of courts to establish the law, it is established that a frontage assessment, although valid in towns and cities, is not valid in rural districts.<sup>4</sup> But here again is encountered the principle that a legislative decision if authorized by the constitution is conclusive, and it must be so in all classes of cases if it is in any. In levee cases an assessment by the acre is held to be valid,<sup>5</sup> and the same principle must obtain in cases affecting rural highways. In other cases it has been held that an assessment may be made according to the value of the lots as they are rated for taxation.<sup>6</sup> The legisla-

<sup>1</sup> *Peay v. Little Rock*, 32 Ark. 31; *McBean v. Chandler*, 9 Heisk. 349. Substantially to the same effect is the decision in *City v. McQuillikin*, 9 Dana (Ky.), 513. But as appears from the cases cited in the preceding note and from others, a frontage assessment is valid. *Rutherford v. Hamilton*, 97 Mo. 543, S. C. 11 S. W. R. 249; *Newman v. Emporia (Kan.)*, 21 Pac. R. 593; *City v. Clemens*, 49 Mo. 552.

<sup>2</sup> *Thomas v. Gain*, 35 Mich. 155; *Washington Ave.*, 69 Pa. St. 352, S. C. 8 Am. Rep. 255.

<sup>3</sup> *Seely v. Pittsburgh*, 82 Pa. St. 360; *Craig v. Philadelphia*, 89 Pa. St. 265; *Washington Avenue*, 69 Pa. St. 352.

<sup>4</sup> *Washington Avenue*, 69 Pa. St. 352; *Craig v. City*, 89 Pa. St. 268; *Philadelphia v. Rule*, 93 Pa. St. 15; *Conger v. Graham (Ky.)*, 11 S. W. R. 467; *Parkland v. Gains (Ky.)*, 11 S. W. R. 649.

<sup>5</sup> *Egyptian Co. v. Hardin*, 27 Mo. 495; *Crowly v. Copely*, 2 La. Ann. 329; *Wallace v. Shelton*, 14 La. Ann. 498; *McGehee v. Mathis*, 21 Ark. 40; *Daily v. Swope*, 47 Miss. 367; *Smith v. Aberdeen*, 25 Miss. 458; *O'Reilly v. Holt*, 4 Woods, 645.

<sup>6</sup> *Downer v. Boston*, 7 Cush. 277; *Snow v. Fitchburgh*, 136 Mass. 183; *Creighton v. Scott*, 14 Ohio St. 438; *People v. Whyler*, 41 Cal. 351; *Lockwood v. St. Louis*, 24 Mo. 20.

ture may, it is generally held, by a direct enactment, in jurisdictions where no constitutional provision forbids the enactment of special laws, declare what shall be a taxing district for the purpose of assessing the expense of a local improvement; it is held, also, that it may delegate this authority to local officers, and it may authorize more than one improvement to be included in one general assessment.<sup>1</sup> It is also held that the legislative decision, whether by the legislature itself, or the municipality to which it has delegated the authority, as to what territory shall compose the district and what improvements shall be included in one general assessment, is conclusive upon the judiciary.<sup>2</sup> Where the statute forbids, either expressly or by implication, the local officers from including more than one improvement in a single order of assessment, they have no authority to provide for more than one improvement.<sup>3</sup> It would seem to be in harmony with the general rule that prevails in cases where the authority exercised is purely statutory that two distinct and radically different improvements can not be included in one general order of assessment, unless by express words or clear implication it is authorized by statute.<sup>4</sup> Improvements are not, however, necessarily distinct and different because different roads or different streets are included, for it may well be that the system is a single and uniform one, although it embraces more than one street. If, in fact, the improvement is a unity, an assessment may be valid, although it embraces in its line more than one street or road.<sup>5</sup> It may often happen that

<sup>1</sup> *Creighton v. Scott*, 14 Ohio St. 438; *Sinton v. Ashbury*, 41 Cal. 525; *Brevoort v. Detroit*, 24 Mich. 322; *Scoville v. Cleveland*, 1 Ohio St. 126; *King v. Portland*, 2 Ore. 146; *Parker v. Challis*, 9 Kan. 155; *Williams v. Cammack*, 27 Miss. 210; *Alcorn v. Hammer*, 38 Miss. 652; *Lisle v. Railroad Co.*, 6 N. W. R. 696; *Pearson v. Zable*, 78 Ky. 170; *Oakland v. Rier*, 52 Cal. 270; *Matter of Powers*, 29 Mich. 504; *Lent v. Tilson* (Cal.), 14 Pac. R. 71.

<sup>2</sup> *Baltimore v. Hughes*, 1 Gil. & J. 480; *Shaw v. Dennis*, 10 Ill. 416; *St. Louis v. Oeters*, 36 Mo. 456; *Litchfield*

*v. Vernon*, 41 N. Y. 123; *People v. Lawrence*, 41 N. Y. 140; *Philadelphia v. Field*, 58 Pa. St. 320.

<sup>3</sup> *Arnold v. Cambridge*, 106 Mass. 352; *Rex v. Tower*, 9 B. & C. 517; *Hersee v. Buffalo*, 1 Sheldon (43 N. Y. Super. Ct.) 445.

<sup>4</sup> *Mayall v. St. Paul*, 30 Minn. 294. It is not necessary that the whole length of a street shall be improved; it is within the discretion of the municipality to improve the whole or part. *Gibson v. O'Brien*, 6 S. W. Rep. 28.

<sup>5</sup> *Grimmell v. Des Moines*, 57 Ia. 144; *Kendig v. Knight*, 60 Ia. 29; *Stoddard*



in order to secure a complete and effective system it is necessary to construct a main line with branches, or to improve two or more streets at once so as to secure a uniformity of grade, and in these, or similar instances, there is no reason why the system may not be considered as a single improvement, except, of course, where the statute supplies a reason for a different rule. A statutory reason is always conclusive if it is not always satisfactory. It has been held that a system which imposes upon a lot the expense of improving a street immediately in front of it is valid, and in support of this position it is asserted that the question is one of power and not of benefit.<sup>1</sup> This ruling produces consequences of great injustice. It would impose upon the owner of a lot in a ravine the expense of the entire fill in its front, although that expense might be greater than the expense of improving all the other part of the street, so, if the ground in front was high it might cost as much as all the other work to reduce it to a proper level, and yet the owner would be compelled to bear it all. This, too, might occur in a case where it is evident that all other lots on the line of the street would share the benefit accruing from a reduction of the street to a uniform grade. Nor is the doctrine on which the ruling is rested a sound one, for it is almost uniformly held, as on principle it must be, that the question is one of benefit and not solely one of power. It must, however, be conceded that once it is granted that the question is one for legislative decision solely, the conclusion reached in the case we are considering must follow and the court is, therefore, not inconsistent in its conclusion, for it follows from the premises. The system which leads to the least mischievous and unjust consequences is that which takes into account the entire line of the way improved and apportions the expense according to the frontage, for it takes into consideration the benefit to each property owner that accrues from the improvement of the entire line of the way, and does not impose upon one lot owner an unjust portion of the burden. It is true that no system can be devised that will

*v. Johnson*, 75 Ind. 20; *Matter of Ingraham*, 64 N. Y. 310; *Cuming v. Grand Rapids*, 46 Mich. 150.

<sup>1</sup> *Warren v. Henly*, 31 Ia. 38; *Morrison v. Hershire*, 32 Ia. 271.

be entirely just and equal in its operation, and the system we mention will not be so invariably, nor, indeed, in general where it so operates as to leave an owner's lot far below or far above the grade of the street. But the system which takes into consideration the entire line of the improvement is by far the most just and equitable. It can not be doubted that the improvement of an entire road or street adds to the value of all the property abutting upon it; nor, on the other hand, can it be doubted that to improve a street in patches, leaving here and there unimproved places, or inequalities obstructing or interfering with travel, would be of comparatively little benefit to any of the abutting property.

When it is granted that the legislature or the local authorities may arbitrarily decide that the improvement does benefit the land to the extent of the expense of making it, then the conclusion that notice is not required necessarily follows. This has been expressly so held.<sup>1</sup> While this conclusion results from the proposition, which is unquestionably sustained by the weight of authority, yet it is a conclusion at variance with principle, since, whether a benefit equal to the burden does or does not result from the improvement, is intrinsically and properly a matter for judicial investigation, and in all such cases notice is essential.<sup>2</sup> The very result to which the doctrine necessarily leads, that notice is not required, is an argument of no little weight against its validity. As the question now stands it must be affirmed, upon the decided weight of authority, that notice is not required on the question of whether the

<sup>1</sup> *Amery v. City*, 72 Ia. 701; *Cleveland v. Tripp*, 13 R. I. 50; *Clapp v. City*, 35 Conn. 66; *Mayor v. Johns Hopkins Hospital*, 56 Md. 1; *Gillett v. Denver*, 21 Fed. 822.

<sup>2</sup> *Hare's Am. Const. Law*, 312; *Coolley's Const. Lim.* (5th ed.) 615, with *n*; *Walston v. Nevin*, 128 U.S. 578; *Hagar v. Reclamation District*, 111 U. S. 701. Whether the Supreme Court of the United States will hold that there is "due process of law" where there is no notice is, judging from the expressions in recent opinions, very questionable.

Under the Fourteenth Amendment that question may, with reason, be regarded as a Federal one. *Scott v. City of Toledo*, 36 Fed. R. 385; *Davidson v. New Orleans*, 96 U. S. 102; *County of Santa Clara v. Railroad*, 18 Fed. R. 409; *Spencer v. Merchant*, 125 U. S. 351; *Stuart v. Palmer*, 74 N. Y. 183; *Railroad Tax Cases*, 13 Fed. R. 753; *Stephenson v. Brunson*, 83 Ala. 455, S. C. 3 So. R. 768; *Fleming v. Hull*, 73 Ia. 598; *Lufken v. Galveston (Texas)*, 11 S. W. R. 340.

benefits equal the expense, where, for instance, the statute expressly authorizes designated property to be assessed, or where it authorizes assessments by the front foot, but this doctrine does not, we say by the way, go further, for, at some stage before final judgment, the land owner is entitled to notice upon other questions that are open to investigation.

Where the statute expressly, or by implication, requires assessments to be made according to the benefits which accrue to the land, and does not provide that they shall be made upon abutting land or upon lots fronting on the line of the improvement, the local officers must ascertain the benefits in some appropriate mode, and the assessment must be made upon that basis and not upon an arbitrary one determined simply by ascertaining the frontage of the lots.<sup>1</sup> In such a case it is necessary to have the benefits ascertained by some tribunal possessing authority of a judicial nature, for the local authorities would have no right in an *ex parte* proceeding to adopt an arbitrary rule of assessment.

The local authorities can not levy an assessment upon private property for improving parks or other public grounds unless authorized by statute, and a grant of power to levy assessments for roads or streets does not carry power to assess for such purposes. It is no doubt within the power of the legislature to order the improvement of public parks at the expense of the land owners specially benefited in cases where there is a special benefit accruing to them as individuals distinct from that which accrues to the public generally, but there can be no such right unless a valid statute confers it. The right to levy assessments being purely of statutory creation, it must necessarily follow that, where a statute provides only for the improvement of streets, alleys and highways, no other public grounds can be improved at the expense of the property owners.<sup>2</sup>

The rule, as some of the decisions declare it, is, that the land is liable for the improvement of a public street although the street may be occupied by a railroad track, or by a turnpike owned

<sup>1</sup> Clapp v. City of Hartford, 35 Conn. 66; Balfe v. Lammers *et al.*, 109 Ind. 66; State v. Patterson, 48 N. J. L. 435. 347.

<sup>2</sup> City of Ft. Wayne v. Shoaf, 106 Ind.

by a private corporation. The theory is that the way remains a street qualified only by the rights of the owners of the easement.<sup>1</sup> We are not inclined to adopt the view that land owners may be compelled to pay the expense of improving a turnpike owned by a private corporation having a right to exact tolls, for, as we believe, the cost of the improvement is only assessable against the party benefited and that is the private corporation and not the citizen. There is much reason supporting the decision that the property owners can not be held liable for the expense of improving any part of a street occupied by a railroad track, although they may be for the other part.<sup>2</sup>

The established rule that only such property as the statute makes liable can be subjected to the assessment seems, in itself, to lead undeviatingly to the conclusion that, in no event can there be a personal liability unless it is so provided by statute. The authority to charge a special assessment upon property can not be deduced from the provisions of a statute conferring authority to levy general taxes. It is agreed without very much diversity of opinion that, as the authority to levy special assessments is purely statutory, and that as there is a substantial and clearly defined distinction between the authority to levy general taxes and the authority to levy local assessments, the authority to levy the one does not confer authority to levy the other, because the authority in the one case is derived from a delegation of a general power, and in the other from a special power, dependent for its vitality upon the theory that the owner is compensated for the assessment he is compelled to pay by the betterment of his land. If this reasoning is valid it necessarily follows that the delegation of the one does not carry the other, and that the authority to assess other property than that benefited can only be conferred, if indeed, it can be conferred at all, by an express legislative grant.<sup>3</sup> It is, there-

<sup>1</sup> *Bagg v. Detroit*, 5 Mich. 336; *State v. Atlantic*, 34 N. J. Law, 99; *State v. Brunswick*, 32 N. J. L. 548; *Richards v. Cincinnati*, 31 Ohio St. 506.

<sup>2</sup> *P. & B. R. R. Co. v. State*, 29 Cent. L. J. 246. See the Chapter on Street Railways.

<sup>3</sup> *Macon v. Patty*, 57 Miss. 386; *Wright v. Chicago*, 20 Ill. 352; *Chicago v. Wright*, 32 Ill. 192; *Craw v. Village of Tolono*, 96 Ill. 255; *Virginia v. Hall*, 96 Ill. 278; *Wolf v. Philadelphia*, 105 Pa. St. 25; *Mix v. Ross*, 57 Ill. 123.

fore, correctly held, as we think, that in the absence of a statute there is no right to seize any other property than that directly assessed, and consequently no personal liability.<sup>1</sup> The contractor can not look to any other property than that assessed.<sup>2</sup> This much is clear upon principle; but whether the legislature can create a personal liability by a direct enactment is a question of more difficulty. It is not easy to perceive how the assessment can extend beyond the property against which it is directed, since the sole foundation of the right to direct and enforce the assessment rests upon the theory that the land receives a benefit equal to the assessment.<sup>3</sup> If the land, with the superadded value given it by the improvement, will not pay the assessment, there is no constitutional warrant for the right to seek payment of the assessment elsewhere, for the land is all that the improvement can by any possibility benefit, and land that is not benefited can not be seized without violating the principle which forbids the taking of property without compensation, nor without breaking down the only theory upon which it is possible to sustain local assessments, and, yet, if there is a personal liability, the assessment may be enforced although the land, even as enhanced in value by the improvement, may not be worth a tithe of the expense of making the improvement. The power of making special assessments is, at best, a dangerous one to entrust to municipalities; it is one, too, that is deduced by a process that it requires no little argument to defend, and it ought not to be so extended as to put in peril, not only the land theoretically benefited, but all the other property of

<sup>1</sup>Green v. Ward, 82 Va. 324; Wolf v. Philadelphia, 105 Pa. St. 25.

<sup>2</sup>City of New Albany v. Sweeny, 13 Ind. 245; Balfe v. Lammers, 109 Ind. 347, 350; City v. Moore, 113 Ind. 597, 599; Board v. Fullen, 111 Ind. 410.

<sup>3</sup>Wewell v. Cincinnati (Ohio), 12 West. Rep. 861; *In re* Adjustment Com., 49 N. J. L. 488; Wright v. Boston, 9 Cush. 233; McGonigle v. Allegheny City, 44 Pa. St. 118; Lockwood v. St. Louis, 24 Mo. 20; Palmer v. Way, 6 Col. 106; Litchfield v. Vernon,

41 N. Y. 126; Allen v. Drew, 44 Vt. 174; Tide Water Co. v. Coster, 18 N. J. Eq. 519; Palmer v. Stumph, 29 Ind. 329; Hale v. Kenosha, 29 Wis. 599; Bridgeport v. New York, etc., R. R. Co., 36 Conn. 256; Alexander v. Baltimore, 5 Gill. 383; Hayden v. Atlanta, 70 Ga. 817; Raymond v. Cleveland, 42 Ohio St. 522. *Contra*, Morrison v. Hershire, 32 Ia. 271; Warren v. Henly, 31 Ia. 31; State v. Charleston, 12 Rich. 702.

which its owner may be possessed. The decisions which declare statutes imposing a personal liability upon the land owner unconstitutional are, in our judgment, so strongly entrenched in principle that they can not be shaken.<sup>1</sup> There are, however, cases in which the validity of such statutes is expressly affirmed and others in which it is tacitly assumed.<sup>2</sup> It is no answer to the argument against the validity of such statutes to assert that the levying of special assessments is an exercise of the taxing power and that the legislative exercise of this power is not subject to judicial supervision; for it is not true that the legislative power is unfettered, and it is true that it is not only the right, but the duty of the judiciary to declare void all statutes that violate the provisions of the constitution. If assessments are levied where there is no special benefit, the constitutional principle that taxes shall be uniform and equal is violated, and the statute should fall.

It is difficult, if not impossible, to extract a satisfactory conclusion from the authorities as to how far the courts may go in deciding upon the validity of an assessment where it has been levied in conformity to a statute. From the cases which we have already referred to it is apparent that there is no little conflict and confusion, and the confusion grows deeper as the cases are further explored. In one case it was directly held that the decision of the common council as to what shall compose the taxing district is conclusive,<sup>3</sup> and in another, that if the district is so laid out as to destroy equality the courts will annul

<sup>1</sup> *Higgins v. Ausmuss*, 77 Mo. 351; *Louisiana v. Miller*, 66 Mo. 467; *Neehan v. Smith*, 50 Mo. 525; *Macon v. Patty*, 57 Miss. 378; *Craw v. Tolono*, 96 Ill. 255; *Virginia v. Hall*, 96 Ill. 278; *Gaffney v. Gough*, 36 Cal. 104; *Taylor v. Palmer*, 31 Cal. 240; *Seattle v. Yerter*, 1 Wash. Ter. 576; *Broadway v. McAtee*, 8 Bush. 508; *Burlington v. Quick*, 47 Ia. 226; *Green v. Ward*, 82 Va. 324.

<sup>2</sup> *Mayor v. Colgate*, 12 N. Y. 143; *In re Vacation Center St.*, 115 Pa. St. 247; *Hazzard v. Heacock*, 39 Ind. 172; *Lefever v. Detroit*, 2 Mich. 586; *Ech-*

*bach v. Pitts*, 6 Md. 71; *Lovell v. City*, 10 Minn. 293; *Nichols v. Bridge-* 23 Conn. 190; *Lowell v. French*, 6 Cush. 223; *New Orleans v. Wire*, 20 La. Ann. 500; *Bonsall v. Lebanon*, 19 Ohio, 419; *Clemens v. Mayor*, 16 Md. 208. The question of the constitutionality of such statutes was not recognized in *Davidson v. New Orleans*, 96 U. S. 97. So far as any intimation is given it is against their validity, but the question was decided not to be a Federal one, and no judgment was given upon it.

<sup>3</sup> *Rogers v. St. Paul*, 22 Minn. 494.

the decision of the local officers.<sup>1</sup> In other cases it is broadly laid down that an assessment can not stand unless the benefit is equal to the expense.<sup>2</sup> In still other cases it is adjudged that a statute which does not fix a certain standard by which the assessment shall be made is unconstitutional.<sup>3</sup> It is held by other courts that it must appear in some way that the benefit equals the assessment.<sup>4</sup> Other cases affirm that if the legislature erects the standard by fixing the district, by providing that property shall be assessed by the front foot, or by the acre, the decision as to what the standard shall be is conclusive,<sup>5</sup> and yet other cases assert that this general rule is not without exceptions.<sup>6</sup> As much, perhaps, as can be safely affirmed to be established by the weight of authority—and we are now considering the question upon the adjudged cases and not upon principle—is that a statute is valid which provides that assessments shall be by frontage or by the acre upon abutting or upon adjoining property, and, that in such cases, the courts are precluded by the decision of the legislature or the local authorities from enquiring whether the benefit equals the expense, but that there are other cases in which the courts are not precluded from enquiring whether the assessment is so unequal and unjust as to violate the principle which requires uniformity and equality.

The decisions are generally to the effect that the assessment

<sup>1</sup> *Preston v. Roberts*, 12 Bush. (Ky.) 570.

<sup>2</sup> *Thomas v. Gains*, 35 Mich. 155.

<sup>3</sup> *Barnes v. Dyer*, 56 Vt. 469; *State v. Newark*, 8 Vroom N. J. 415, S. C. 18 Am. Rep. 729; *New Brunswick, etc., Co. v. Commissioner of Streets*, 9 Vroom (N. J.), 190, S. C. 20 Am. Rep. 380; *State v. Mayor*, 8 Vroom (N. J.), 412; *Whiteford v. Probate Judge*, 53 Mich. 130. In *State v. Newark, supra*, it was said: "The only safe rule is, that the statute authorizing the improvement shall itself fix either in terms or by fair implication the legal standard to which the assessment must be made to conform. In no other way can property be adequately protected."

<sup>4</sup> *Crawford v. People*, 82 Ill. 557.

<sup>5</sup> *People v. Lawrence*, 41 N. Y. 140; *St. Louis v. Peters*, 36 Mo. 456; *Shaw v. Dennis*, 5 Gilm. 405; *Philadelphia v. Field*, 58 Pa. St. 320; *Macon v. Patty*, 57 Miss. 378; *Kelley v. Cleveland*, 34 Ohio St. 468; *Bigelow v. Chicago*, 90 Ill. 49.

<sup>6</sup> *Baltimore v. Hughes*, 1 Gill. & J. 480, 483; *Litchfield v. Vernon*, 41 N. Y. 123; *People v. Lawrence*, 41 N. Y. 146; *Washington Av.*, 69 Pa. St. 352; *Wright v. Boston*, 9 Cush. 233; *State v. St. Louis*, 1 Mo. App. 503; *St. Louis v. Octers*, 36 Mo. 456; *Clapp v. Hartford*, 35 Conn. 66; *Hungerford v. Hartford*, 39 Conn. 279.

is valid, although the peculiar nature of the property excludes the conclusion that it could have received an actual and an immediate benefit. Ordinarily, the question of benefits is determined by ascertaining what value the improvement adds to the market price of the property, but this rule can not be invariably applied to assessments for the improvement of roads or streets. Thus, the fact that the property is occupied by a railroad track,<sup>1</sup> or that it is used as a cemetery,<sup>2</sup> or for purposes of religious worship,<sup>3</sup> or is set apart to charitable or educational purposes,<sup>4</sup> will not exempt it from assessment unless the statute so provides. Property may be liable to the assessment, as it is held by some of the courts, and yet not be subject to sale on the assessment, as, for instance, in case of burial grounds.<sup>5</sup> It is not without difficulty, at least, that the decisions on the point just mentioned can be harmonized with the general doctrine that where a remedy is provided by statute for the enforcement of an assessment that remedy is exclusive.

Public property held for governmental purposes, as a courthouse, can not be sold to pay an assessment levied for the improvement of a street unless a sale is expressly authorized by the statute, nor will such property be deemed within the general words of a statute delegating, in general terms, the authority to levy local assessments. Statutes conferring a general authority to assess are to be construed as operating upon property subject to legal process, and not upon property held for

<sup>1</sup> *Peru, etc., Co. v. Hanna*, 68 Ind. 562; *City v. Baer*, 41 Ill. 306; *Northern, etc., Co. v. Connelly*, 10 Ohio St. 159; *Burlington, etc., Co. v. Spearman*, 12 Ia. 112; *New Haven, etc., Co. v. Fair Haven, etc., Co.*, 38 Conn. 422; *Bridgeport v. New York, etc., Co.*, 36 Conn. 255; *Chicago, etc., Co. v. Chicago*, 90 Ill. 573; *Ludlow v. Trustees*, 78 Ky. 357; *Appeal of North Beach, etc., Co.*, 32 Cal. 499; *Compare State v. Newark*, 27 N. J. L. 185.

<sup>2</sup> *Buffalo, etc., v. Buffalo*, 46 N. Y. 506; *Baltimore, etc., v. Proprietors, etc.*, 7 Md. 517.

<sup>3</sup> *Matter of Mayor, etc.*, 11 Johns. 80; *Northern Liberties v. St. Johns*, 13 Pa. St. 104; *Second, etc., Society v. Providence*, 6 R. I. 235; *Lefevre v. Detroit*, 2 Mich. 587; *Trustees v. Ellis*, 38 Ind. 3; *Rausch v. Trustees*, 107 Ind. 1; *Broadway, etc., v. McAtee*, 8 Bush. 508.

<sup>4</sup> *Cincinnati College v. State*, 10 Ohio, 110; *Lafayette v. Orphan Asylum*, 4 La. Ann. 1.

<sup>5</sup> *Louisville v. Nevin*, 10 Bush. (Ky.) 549, S. C. 19 Am. Rep. 78; *Lima v. Cemetery Association*, 42 Ohio St. 128.



governmental purpose by the State or any of the local instrumentalities of government.<sup>1</sup>

The question whether a patented process can be used in the improvement of a street at the cost of the property owners has given rise to some discussion, but we think the better opinion is that it may be so used.<sup>2</sup> If it were to be held otherwise then progress might be arrested, and the property owners deprived of the best and most lasting improvement. There is, however, not a little to be said on the opposite side of the question, for if a patented process can be used, there can be no real competition. But the law as a practical science chiefly regards utility, and this consideration turns the scale.

It has been held that the authority of a municipal corporation to levy an assessment for the improvement of a street, is not impaired by the fact that the corporation has a contract with a street railroad company wherein the company agrees to repair or improve the street.<sup>3</sup> The existence of such a contract does not extinguish the authority of the public corporation, but, as we believe, it ought to preclude its exercise, unless it is made to appear that the agreement of the company can not be enforced because of its insolvency, or for some other sufficient reason. The contract takes the duty of making the improvement from the citizens and places it upon the private corporation, and the removal of the duty should, in justice, be deemed a removal of the burden. Where the property owner is under no duty he can not rightfully be subjected to any liability. The case to which we have referred cites with approval a case wherein it is held that the duty rests upon the private corporation, and it also affirms that the property owners have a right and have some remedy, but it declines to decide what

<sup>1</sup> *Lowe v. Board*, 94 Ind. 553; *President, etc., v. Indianapolis*, 12 Ind. 620. See, also, *Worcester Co. v. Worcester*, 116 Mass. 193; *Leonard v. City of Brooklyn*, 71 N. Y. 498; 2 Dill. Munic. Corp., sections 576, 577.

<sup>2</sup> *City v. Raymo* (Md.), 13 Atl. Rep. 383; *Hobart v. Detroit*, 17 Mich. 246; *In re Eager*, 46 N. Y. 100; *In re Du-*

*gro*, 50 N. Y. 513; *Yarnold v. Lawrence*, 15 Kan. 126; *Contra, Nicolson Pavement Co. v. Fay*, 35 Cal. 695; *Same v. Painter*, 35 Cal. 699; *Dean v. Charlton*, 23 Wis. 590; *Burgess v. Jeffersonville*, 21 La. Ann. 143.

<sup>3</sup> *People v. City of Brooklyn*, 65 N. Y. 349.

they are.<sup>1</sup> If, as it is decided, the contract does give the citizens a legal right that right must be a relief from the obligation which the company agrees to perform. But independently of contract there is strong reason why a street railroad company which uses a public street for its private gain should be required to keep the part of the street it occupies in repair and make it at all times correspond to the other portions of the street. In accepting the privilege of using the street, it impliedly undertakes that as to so much of it as it uses it shall bear the burden of repairing and improving whenever repairs and improvements of the whole width of the street are lawfully ordered. Private corporations must take notice that the authority to improve streets is a continuing one, and it should be held that they use the street subject to the authority, and charged with the duty of making the part occupied by them correspond with the adjoining parts. They accept the privilege of using the street upon the implied condition that they will do in the matter of improvements what adjacent land owners are required to do. The principle which applies to such cases is essentially the same as that which rules in cases where railroads cross or occupy ordinary highways.<sup>2</sup> It is no doubt true, that the municipal corporation is not relieved from its duty to keep its streets reasonably safe for travel, by any contract, express or implied. This, however, is no answer to the argument that the duty of paying the cost of the improvement having been assumed by the private corporation, it no longer rests upon the land owner, for the land owner's obligation does not arise out of a duty to keep the street safe, but from the fact that his property has received a special benefit. Strike out the element of benefit and a special assessment loses its foundation. Put the case upon the broad and equitable principle that he who receives the benefit must bear the burden, and it becomes at once apparent that the street railroad company should pay the cost of improv-

<sup>1</sup>City of Brooklyn *v.* Brooklyn City R. R. Co., 47 N. Y. 475. Said the court in the case cited in the preceding note: "The remedy of a party thus compelled to pay an assessment which another party ought to pay must be reached in some other and different form, but precisely in what form we are not now called upon to decide."

<sup>2</sup>Evansville, etc., Co. *v.* Crist, 116 Ind. 446; 2 Woods on R. W., section 271.

ing the highway. The just and equitable method in such cases is for the public corporation to pay the cost of improving the part of the street occupied by the tracks of the railroad company and collect it from the company. It is neither in accordance with technical legal rules, nor with broad principles of natural justice, to put upon the citizen the burden of compelling the private corporation with whom the municipality has contracted to perform its contract; but, primarily and equitably, that duty rests upon the party with whom the contract was made. It is proper here, as elsewhere, to look to consequences,<sup>1</sup> and regard should be had to the fact that to the municipality the amount will be considerable, but to each property owner, comparatively inconsiderable, and that one action by the municipality will settle the whole controversy, whereas, if each property owner must sue it will breed many actions. But more than this, the burden ought not to be put upon the party who is not at all in default.

The assessment can only be levied for the actual cost of the improvement, and the local authorities can not include in the assessment the expense of any other work than such as is necessary to complete the particular improvement in a reasonable and fair mode,<sup>2</sup> but it is not always easy to determine what can fairly be considered part of the improvement. What can be definitely said upon this subject is this: Whatever is necessary to prepare the bed of the road or street, to bring it to a proper grade, to provide for carrying from the way water that falls upon it, and to cover with suitable materials and proper work the surface of the way as contemplated and designed by the ordinance, constitutes part of the general improvement, and may be included in the assessment. It may be that in some instances the services of skilled men may be required in order to secure the proper plans and the proper performance of the work, and in such cases the compensation paid for such services may properly form part of the expense, but it can only be in rare instances that such items of expense can be included in the assessment. Services rendered by officers of a municipal corporation who

<sup>1</sup> *United States v. Kirby*, 7 Wall. 482;      <sup>2</sup> *Brown v. Fitchburg*, 128 Mass. 282.  
*Rodman v. Reynolds*, 114 Ind. 148.

are paid a regular salary, should not be considered as forming any part of the cost of the improvement.<sup>1</sup> It is the duty of municipal corporations to provide the appropriate machinery for making public improvements and the individual citizen charged with special benefits ought not to be compelled to bear any part of the expense of that machinery beyond that which he pays as one of the tax payers of the municipality. While it is just to carefully guard the interests of the land owner, yet it is not just to so rigidly construe the general words of a statute that a complete improvement can not be made, for the true policy is to secure as soon as practicable, durable and complete roadways that will not require frequent repairs or quickly cease to be of use for safe and convenient passage. The words of the statute must, to be sure, always control, but in giving them effect it is proper to consider the object intended to be attained, and this ought not to be defeated by a rigidly strict adherence to the letter of the law, or a mistaken application of the rule that such statutes are to be strictly construed, for, while this is undoubtedly the rule, still it does not follow that the chief object of the statute, that of securing safe, convenient level highways, should be defeated. The rule that the object designed to be accomplished furnishes a safe means of interpretation is higher than that of strict construction.

The question of what is to be considered part of the improvement is by some of the courts declared to be a question of fact for the jury,<sup>2</sup> but this doctrine is not applicable to every case, even if its soundness in any case can be conceded, for it must be true that in by far the greater number of instances the court must direct the jury, as matter of law, what is to be considered as part of the improvement within the meaning of the statute. The general words of the statute include within their sweep many subordinate and incidental matters, and it is often the duty of the court to determine what these are by assigning to the words of the statute their legitimate scope and effect.<sup>3</sup>

<sup>1</sup> *Board v. Fullen*, 118 Ind. 158, S. C. *Haven v. Whitney*, 36 Conn. 373; *In re Philips*, 60 N. Y. 16; *O'Leary v.* 20 N. E. R. 771.

<sup>2</sup> *Schenley v. Com.*, 36 Pa. St. 29. *Sloo*, 7 La. Ann. 25; *Steckert v. East*

<sup>3</sup> *Warren v. Henly*, 31 Ia. 31; *Mc-* *Saginaw*, 22 Mich. 104.  
*Namara v. Estes*, 22 Ia. 246; *New*

Whether the statute authorizes any improvement to be made at the expense of the property owners, is, of course, always a question of law, and the question of what can be considered as part of an improvement under the statute must, in most instances, be one of law rather than of fact. The court must apply to the statute the rule that the grant of a principal power carries with it all subordinate powers necessary to effectuate the exercise of the principal power and declare what conclusion results from the application of the rule to the statute, and not leave this for the jury to do. It is, therefore, generally the duty of the court to instruct the jury what is meant by the words of the statute, as for instance, by such words as "pave," "pavement," and the like.<sup>1</sup>

Municipal corporations may, by the provisions of the ordinance under which the proceedings to assess are conducted, add, in effect, to the requirements of the statute (they can not, of course, add what the statute expressly or impliedly forbids), and when they do add requirements of a material character they must be complied with or the proceedings will fail.<sup>2</sup> Thus, where the ordinance provided that the contractor should be selected by a majority of the property owners and the work was let to a contractor not thus selected, it was held that the assessment could not be enforced.<sup>3</sup> This is the correct doctrine, although it may plausibly be urged that the body which makes the requirement can dispense with it, for the property owners have a right to oppose the adoption of the ordinance, and it may well be that they would have done so but for the requirements added to those of the statute. Nor can it be justly said that the body having the power to impose the requirement has a right to dispense with it, for the property owners are in a position analo-

<sup>1</sup> See authorities cited in preceding note, and *Petition of Burmeister*, 76 N. Y. 174; *Matter of Burke*, 62 N. Y. 224; *Burnham v. Chicago*, 24 Ill. 496; *Burlington, etc., R. R. Co. v. Mt. Pleasant*, 12 Ia. 112, *Powell v. St. Joseph*, 31 Mo. 347; *Fairfield v. Ratcliff*, 20 Ia. 396. In this case it was held that the grant of power "to regulate and improve" sidewalks does not confer authority to

direct an assessment for building them, but this seems rather too narrow a construction.

<sup>2</sup> *Lowell v. Wheelock*, 11 Cush. 391.

<sup>3</sup> *Reilly v. Philadelphia*, 60 Pa. St. 467. Such a provision can not rightfully be inserted in a contract where the statute provides that the work shall be let to the lowest or best bidder after advertising for proposals.

gous to that of third persons with rights of such a nature as to entitle them to protection, although they may not be vested rights in the strict sense of the term. The rule is not unjust to the contractor, for it is his duty to acquaint himself with the proceedings, and if he fails to do so the fault is his own. He is interested in the matter and is directly put upon enquiry and is, therefore, chargeable with all the knowledge which he could have acquired by a reasonable enquiry.<sup>1</sup>

While it is true that the highway officers are bound to proceed in substantial accordance with their own order directing the improvement, still a deviation from it will not vitiate the proceedings unless it does the land owner some material harm. It is by no means every departure from the order or ordinance that will defeat the assessment, for, where no substantial injury is done to the property owners, the officers who made the order or enacted the ordinance may rightfully amend or change it. The public welfare and the interests of the land owners may often be promoted by some change, and the officers who made the original order ought to have some latitude allowed them so that they may be enabled to rectify mistakes or secure better results. The cardinal rule is that nothing shall be permitted that will tend to do harm to the property owners, but this salutary rule is obeyed rather than violated in permitting a change that is beneficial, and it is not infringed by permitting changes that work no harm to the citizens. There is a palpable difference between a case where there is a deviation from the statute and one in which there is a deviation from the order made by the highway officers themselves. In the one case the law is organic; in the other, it is the rule prescribed by officers who had the authority to adopt it for their own government. In the one case there is a departure from the law which grants the only authority the local officers possess; in the other, there is nothing more than a change in a rule adopted by those officers. If the rights of third persons were not involved there could be no doubt as to the right to make the change in the order or ordinance, and it is simply a just extension of that principle to hold that unless the change prejudices the third persons they can

<sup>1</sup> *Newman v. Sylvester*, 42 Ind. 106; *Johnson v. Common Council*, 16 Ind. 227.

not rightfully complain. There is, therefore, sound reason for discriminating between cases where the statute prescribes the rule and cases where the local officers themselves prescribe it, and in practice the distinction between the two cases becomes quite important.

In conformity to the rule to which we have often referred, that in the matter of local improvements much is committed to the discretion of the highway officers, it is held that, where there are no statutory provisions to the contrary, those officers may determine how much of the road or street shall be improved. Part of a road or street may be improved if the highway officers in their discretion deem best to improve no more than a part.<sup>1</sup> While the highway officers have a broad discretion, still their action is not entirely beyond judicial control; if the discretion is abused their action will be annulled upon timely and appropriate complaint to the courts. If the improvement should be so ordered as to cut it up into parts and thus cast upon specific property burdens grossly unjust, the courts certainly ought to interfere for the protection of the citizen. It would doubtless require a strong case to justify judicial interference, but there may be such cases.<sup>2</sup> The presumption should always be that the highway officers have done their duty and have not abused their discretion,<sup>3</sup> but this presumption may be overborne by facts showing the manifest and gross injustice of their acts. The courts will interfere with reluctance and only in clear

<sup>1</sup> *City of Lafayette v. Fowler*, 34 Ind. 140; *St. Louis v. Clemens*, 36 Mo. 467; *Craycraft v. Selvage*, 10 Bush. (Ky.) 696; *Creighton v. Scott*, 14 Ohio St. 438; *Scoville v. Cleveland*, 1 Ohio St. 126.

<sup>2</sup> "We have no doubt," said the court in *Allen v. Drew*, 44 Vt. 174, "that a local assessment may so far transcend the limits of equality and reason that its exaction would cease to be a tax, or contribution to a common burden, and become extortion and confiscation. In that case it would be the duty of the court to protect the citizen from robbery under color of a better name."

In the *City of Louisville v. Louisville Rolling Mill Co.*, 3 Bush. (Ky.) 416, the court set aside an assessment, saying: "Our conclusion then is, that the improvement is of such an extraordinary character, and so peculiarly injurious to the proprietors of the rolling mill, that, so far from making them at their own expense, damage their property so greatly, it should not at all be done without compensation to them."

<sup>3</sup> *Wright v. Forestal*, 65 Wis. 341; *In re Brady*, 85 N. Y. 269; *State v. Township of Union*, 37 N. J. L. 268; *In re Ingraham*, 64 N. Y. 310.

cases, but they will not abdicate all power of review and supervision. They will not substitute their judgment for that of the local officers, but they will not permit those officers to so abuse their discretion as to do great injustice to the citizens. This is but the application of a familiar principle of elementary law, for when once the local officers go beyond the limits of their discretionary powers, they are in a province where they have neither right nor authority.

The presumption that highway officers have proceeded regularly and have justly exercised their discretion prevails only in cases where they have jurisdiction. Where there is jurisdiction the presumption is of sufficient strength to support the proceedings and require payment of the assessment, unless some material error or defect appears on the face of the record, or by extrinsic evidence it is made to appear that there is some material error or irregularity.<sup>1</sup> It is important to keep in mind that the general rule that highway officers are presumed to do their duty does not apply in all classes of cases, or even to every person interested in a class to which it does apply. It does not apply in a case where title is sought to be established under a sale made on a local assessment, and this rule illustrates the distinction between proceedings to compel payment of the assessment and an action to secure title. One who seeks to deprive the land owner of his title can not succeed upon the presumption, but the land owner may be required to do equity by paying the assessment.<sup>2</sup> Nor can one who contracts to do the work rely upon this presumption; he must examine the records and at his peril ascertain the facts.<sup>3</sup>

The judgment of highway officers as to what is required to constitute an improvement of the kind ordered is to be regarded as *prima facie* correct, just as it is upon the question whether it is expedient and proper to improve part of a road or street.

<sup>1</sup> *In re* Protestant Episcopal Schools, 75 N. Y. 324; *Appeal of North Beach*, etc., R. R., 32 Cal. 499; *Chiniquy v. People*, 78 Ill. 570, *Bergen Co. Bank v. Township of Union*, 44 N. J. L. 599; *Parish v. Golden*, 35 N. Y. 462; *Kalbrier v. Leonard*, 34 Ind. 497.

<sup>2</sup> *Ehni v. Columbus*, 3 Ohio Circ. Ct. 496; *Daly v. San Francisco*, 72 Cal. 154.

<sup>3</sup> *Boardman v. Haynes*, 29 Ia. 339; *Clark v. City of Des Moines*, 19 Ia. 199; *Newman v. Sylvester*, 42 Ind. 106; *Citizens', etc., Co. v. Town*, 114 Ind. 332; *Swift v. City*, 24 Barb. 427.



What we have said, we add to prevent possible misconception, is applicable only where there is no statute specifically directing what shall be done, but it is always applicable, where, as is usually the case, the authority of the highway officers is conferred by general words. While it is true that the highway officers have a very broad discretion, still, their judgment, even though delivered in good faith, is not always conclusive upon the question as to what is necessary to be done in order to complete an improvement. In accordance with this doctrine it has been held that the judgment of the members of the common council of a city that a fill is necessary to the work of paving is not conclusive.<sup>1</sup> This ruling presses the doctrine to the very verge, and, indeed, it is doubtful whether it does not go beyond the safe rule; at all events, the fill should be of such an unusual character as to make the case a unique one to justify such a ruling, for it is matter of common knowledge that it is necessary in every instance to bring the roadway to a level in order to properly do the work of paving, and it would seem, therefore, that whether a fill is or is not properly part of the work should be left to the judgment of the local authorities. It has also been held that under the authority to pave, the municipal officers can not make an assessment for grading done under a separate contract awarded prior to the adoption of the ordinance providing for paving.<sup>2</sup> This decision can have no application where the power to improve is not restricted to paving or some specific method of making or improving a road or street, and it is not altogether clear that it is sound even under a statute which restricts the authority to improve by limiting it to paving. It is somewhat difficult to find a sufficient reason for declaring, as matter of law, that it may not be expedient to do the work of grading preparatory to that of paving, since it can hardly be said that courts know what is necessary to be done in order to secure a proper pavement. The truth is, that courts should be slow to assume the right to decide such questions, since it is only in exceptional cases that they have a right to decide

<sup>1</sup> *Bucroft v. City of Council Bluffs*, 63 Ia. 646; *Scofield v. City of Council Bluffs*, 68 Ia. 695.  
<sup>2</sup> *Scofield v. City of Council Bluffs*, 68 Ia. 695.

them, and it is quite likely that mischief will result from their interference. What should be included in an improvement of a designated kind and how the improvement can best be made are matters which really fall within the scope of the general authority granted to the local officers, since the power to make the improvement necessarily includes the authority to determine what it shall be, how it shall be made, and what is necessary to complete it in the best manner, and if these matters are within the authority granted the right of the courts to interfere is excluded, except in cases where there is a clear abuse of the authority granted. Whatever it is necessary to do to complete the improvement and to make it serviceable and lasting, the local officers have a right to do,<sup>1</sup> and whether a thing is or is not necessary is a question for the decision of the officers to whom the discretionary power is delegated.

The power to make improvements and levy assessments to pay the cost of the work carries with it the incidental authority to make contracts and to require security from the person to whom the contract is awarded.<sup>2</sup> Where the statute confers the general power it invests the highway officers with a very broad discretion, and, within the limits of the power vested in them, they may make such a contract in form and substance as they choose. But where the statute prescribes what the contract shall contain, or provides the mode in which it shall be executed, the proceedings will fail if appropriately and seasonably challenged, unless the contract substantially contains what the statute prescribes and is executed as it directs.<sup>3</sup> Thus, where

<sup>1</sup> *State v. New Brunswick*, 44 N. J. L. 116; *In re Smith*, 99 N. Y. 424; *Longworth v. Cincinnati*, 34 Ohio St. 101; *Dashiell v. Baltimore*, 45 Md. 615; *Petition of Lowden*, 89 N. Y. 548; *Matter of Mutual Life Ins. Co.*, 89 N. Y. 530. The highway officers can not, of course, declare a thing to be part of the improvement which clearly is not. *Armstrong v. St. Paul*, 30 Minn. 299.

<sup>2</sup> *Cumming v. Mayor*, 11 Paige, 596.

<sup>3</sup> *Bank of United States v. Dandridge*, 12 Wheat. 64; *Head v. Insurance Co.*, 2 Cranch. (U. S.) 127; *Dey v. Jersey*

*City*, 19 N. J. Eq. 412; *White v. New Orleans*, 15 La. Ann. 667; *Montgomery Co. v. Barber*, 45 Ala. 237; *Murphy v. City of Louisville*, 9 Bush. (Ky.) 189; *Leavenworth v. Rankin*, 2 Kan. 357; *McDonald v. Mayor*, 68 N. Y. 23, S. C. 23 Am. Rep. 144; *Addis v. Pittsburgh*, 85 Pa. St. 379; *Hurford v. Omaha*, 4 Neb. 350; *Bently v. County Com.*, 25 Minn. 259; *Dore v. Milwaukee*, 42 Wis. 108; *People v. Weber*, 89 Ill. 347; *Allen v. Galveston*, 51 Tex. 302

the statute requires that the contract shall be in writing its requirement will not be satisfied by an oral agreement.<sup>1</sup>

In a strict sense the property owners are not parties to the contract, nor are the highway officers their agents. Those officers are not, in fact, the agents of the public corporation, nor of the land owners, but simply officers engaged in the performance of a public duty imposed upon them by law.<sup>2</sup> But, while the property owners are not parties to the contract, they have a beneficial interest in it, and this interest can not be divested by the subsequent acts of the local authorities. When the contract has been duly awarded and the work commenced, the highway officers have no right to annul or disregard it. The contract, when once entered into, creates rights which the local officers can not destroy. Nor can the local officers rightfully dispense with the performance of any material part of the contract, for as the property owners are the persons who must pay for the improvement they have the right to demand that the work shall be faithfully and properly done.<sup>3</sup>

It is beyond the authority of the highway officers to do any act that will materially prejudice the rights of the citizens, but they may make amendments and changes which do not substantially impair the rights of the citizens. This must be so upon principle, for having once lawfully acquired jurisdiction those officers may do what is for the best interests of the public, provided, always, that they do not infringe the rights of those who must pay the assessment. It is upon this ground that it has been held that an extension of time for the performance of the contract beyond that therein designated does not invalidate the proceedings.<sup>4</sup> In so changing the terms of the agreement the local officers do not violate any provision of the organic law from which their authority flows, but they simply change a rule

<sup>1</sup> *City v. Blakemore*, 17 Ind. 318; an important change to be made in the Town v. Jones, 77 Ind. 307; *Budd v. Krauss*, 79 Ind. 137.

<sup>2</sup> *Newman v. Sylvester*, 42 Ind. 106.

<sup>3</sup> *Bond v. Newark*, 19 N. J. Eq. 376; *Lake v. Williamsburg*, 4 Denio, 523; *St. Louis v. Clemens*, 36 Mo. 467. In the case of *Hastings v. Columbus*, 42 Ohio St. 585, the court permitted quite

<sup>4</sup> *Baltimore v. Raymo* (Md.), 13 Atl. Rep. 383; *City v. Fowler*, 34 Ind. 140. "Purely technical objections," says Judge Cooley, "are disregarded everywhere." *Cooley's Taxation*, 667.

of their own creation. To deny this right where its exercise works no substantial injury to the land owner would be an unreasonable exercise of judicial authority.

Where nothing remains to be done except compute the amount that each foot or acre of ground must bear of the burden of the special assessment, then, under the rule which we have already discussed, there is no necessity for notice, but when we go beyond this and reach the point whether the party has a right to be heard on other issues, notably, that of the performance of the work, a very different question emerges. It is undeniably true that a fundamental principle of enlightened jurisprudence is that no citizen's property shall be taken without granting him a right to be heard, or, as it is commonly said, "giving him his day in court." It is quite difficult, as we have endeavored to show, to sustain the doctrine that the legislature may, without a hearing, or a day in court, conclusively fix the amount that each foot, acre or tract of land shall be assessed, but when we go further the difficulty becomes insurmountable. The only defensible rule is that which requires that at some stage of the proceedings before the judgment or decision becomes conclusive the land owner should have notice and an opportunity to be heard. We do not say that he is entitled to be heard on every question—far from that—for we do not believe that he is entitled, as a fundamental right, to be heard on matters which simply affect the question of the regularity of the proceedings, but we do believe that before the final determination, he is entitled to be heard upon questions which vitally touch the validity of the proceedings. What we mean is that upon such questions he can not be denied the right to a hearing which the organic law intends to secure to every citizen before his property rights are actually and materially affected.<sup>1</sup> But while we regard notice as indispensable, we do not believe that it need always be given during the initiatory or original proceedings; on the con-

<sup>1</sup>Cooley's Const. Lim. (5th ed.), 615, regulated entirely by legislation, but as star, p. 501; Waples Proceedings *in* to matters jurisdictional we can not think there is an unrestricted legislative power notwithstanding the many cases that indicate a different opinion. *Rem*, 64; 1 Hare's Am. Const. Law, 312, 317. As to matters of procedure not jurisdictional, it is evident that there need be no hearing, for they may be

trary, our judgment is that if it is provided for at some stage of the proceedings and in such a mode as to give the party an opportunity to be heard before a final conclusion is reached, it will be sufficient. If an appeal is given, clogged by no unreasonable or embarrassing burdens, we suppose that the fundamental principle of which we have spoken is not deviated from.<sup>1</sup>

By some of the courts it is held that the acceptance of the work by the highway officers is only *prima facie* evidence that it has been done according to contract,<sup>2</sup> and this is obviously correct in cases where the statute gives the right of appeal and, either expressly or by fair implication, authorizes the trial of all questions on appeal, or expressly enumerates what shall not be tried, and does not include in the enumeration the question whether the work was or was not performed as the contract requires. According to the great weight of authority the rule, in the absence of a statute granting a right to contest the question whether the work has been done in conformity to the terms of the contract, is, that the acceptance by the highway authorities is conclusive upon the property owners.<sup>3</sup> It is not without dissent<sup>4</sup> that this rule has found general favor, and to us it seems that the broad ground which some of the cases take is untenable. Where it is made to appear that the work is not at all such as the contract calls for, or is entirely worthless, the courts

<sup>1</sup> San Mateo County v. Southern Pacific R. R. Co., 8 Sawyer, 238; Stuart v. Palmer, 74 N. Y. 183, S. C. 30 Am. Rep. 289; Lehman v. Robinson, 59 Ala. 219; Philadelphia v. Miller, 49 Pa. St. 440; Darling v. Gunn, 50 Ill. 424; Butler v. Supervisors, 26 Mich. 22; Myrick v. La Crosse, 17 Wis. 442; New Albany, etc., Co. v. Connelly, 7 Ind. 32; Flournoy v. City of Jeffersonville, 17 Ind. 169; Ray v. City of Jeffersonville, 90 Ind. 567; Garvin v. Daussman, 114 Ind. 429; Law v. Johnston, 118 Ind. 261; Baltimore v. Scharf, 54 Md. 499; Davidson v. New Orleans, 96 U. S. 97.

<sup>2</sup> Gulick v. Connelly, 42 Ind. 134.

<sup>3</sup> State v. Jersey City, 29 N. J. L. 441, 449; Fass v. Seehawer, 60 Wis. 525;

Ricketts v. Hyde Park, 85 Ill. 110; Emery v. Bradford, 29 Cal. 75; Henderson v. Lambert, 14 Bush. 24; Dougherty v. Miller, 36 Cal. 83; Taylor v. Palmer, 31 Cal. 240; Cochran v. Collins, 29 Cal. 129. In Emery v. Bradford, it was held that the same rule applies as that which controls in tax cases, and the court cited among other cases, Peoria v. Kidder, 26 Ill. 358; Aldrich v. Cheshire R. R. Co., 1 Foster, 361; Hughes v. Cline, 30 Pa. St. 230; Lowell v. Hadley, 8 Metcf. 194; Williams v. Holden, 4 Wend. 227.

<sup>4</sup> Murray v. Tucker, 10 Bush. (Ky.) 240; Henderson v. Lambert, 14 Bush. (Ky.) 24; Matter of Orphan, 92 N. Y. 116.

must, on principle, have a right to interfere. Possibly it may be expedient and just to adjudge acceptance conclusive where there is nothing more than a dispute as to whether the work has been reasonably well done, but it can be neither expedient nor just to hold the acceptance conclusive in cases where it appears that the work is of an entirely different kind from that required by the contract or is totally worthless.

Property owners may successfully resist the enforcement of an assessment where fraud of a material nature has influenced the proceedings.<sup>1</sup> Doubtless they might waive their right to impeach the assessment for fraud by acquiescence, but if they should proceed with diligence and before rights were acquired by persons acting in good faith there seems to be no valid reason why they may not succeed in the event that fraud is established. Where a contractor makes a private contract with part of the property owners, wherein he agrees to do the work at a specified price, his conduct is deemed such a fraud upon the other owners as will preclude him from enforcing the assessment against them.<sup>2</sup> If part of the property owners promise to pay a portion of the assessment in order to induce those to whom they make the promise to sign a petition for the improvement, the agreement will be deemed fraudulent and adjudged void upon a direct attack,<sup>3</sup> but such an agreement should not be allowed to vitiate the assessment unless it is made to appear that the contractor has notice of it, except in cases where the assault upon the proceedings is made before the work has been done. It has been held that the cost of the work may be so extravagant and unreasonable as to authorize the inference of fraud.<sup>4</sup> Where the highway officers adopt a plan of assessment which is grossly unjust and unequal, it may justly be considered fraudulent.<sup>5</sup> An acceptance of the work procured by fraud will not be allowed any force.<sup>6</sup>

<sup>1</sup> *Dederer v. Voorhies*, 81 N. Y. 153.

<sup>2</sup> *Brady v. Bartlett*, 56 Cal. 350. The decision in this case in effect overrules the cases of *Nolan v. Reese*, 32 Cal. 484, and *Chambers v. Satterlee*, 40 Cal. 513, and is in harmony with the reasoning in *Emery v. Bradford*, 29 Cal. 75.

<sup>3</sup> *Maguire v. Smock*, 42 Ind. 1; *State*

*v. Johnston*, Adm., 52 Ind. 197-206; *Howard v. First Independent Church*, etc., 18 Md. 451.

<sup>4</sup> In the matter of *Leake and Watts Orphan Home*, 92 N. Y. 116.

<sup>5</sup> *Matter of New York, etc., Public Schools*, 75 N. Y. 324.

<sup>6</sup> *McVerry v. Kidwell*, 63 Cal. 246.

It may happen that the assessment can be made effective by supplying omissions or rectifying mistakes, although no sale can be made upon the assessment.<sup>1</sup> Where there is jurisdiction, an intermediate error or omission will not always invalidate the entire proceedings, but the contractor may secure the proper correction to be made, or the necessary steps that have been omitted to be taken, and then enforce his assessment, but this, of course, can not be done where the errors or omissions are jurisdictional. If the prior proceedings will support the assessment, and the error is one which the local officers can cure, a new assessment may be valid if the mistakes are rectified and the omissions supplied.<sup>2</sup> A mistake in an estimate ordered for a street improvement may be corrected.<sup>3</sup> Where the estimate has been corrected the plaintiff may have the record so amended on appeal as to show that fact, but when it has not been corrected the proceedings must fail until the proper officers make the requisite correction.<sup>4</sup> Where an act of a common council essential to the effectiveness of an assessment has, in fact, been performed, but by mistake no record has been made, the omission may be supplied by a proper *nunc pro tunc* entry.<sup>5</sup> The fact that a judgment has been rendered declaring the proceedings invalid does not conclude the parties from subsequently enforcing an assessment in cases where errors and omissions which the highway authorities had a right to correct and supply are properly corrected and supplied subsequent to the first judgment.<sup>6</sup> This rule can, of course, apply only to cases where the judgment first rendered was based on the fact that there were such errors and omissions, it can not prevail where a case has been heard and determined on its merits. In cases where there is jurisdiction, property owners may be estopped from questioning the validity of the proceedings of the highway officers by standing by and permitting the work to be done

<sup>1</sup> *Goring v. McTaggart*, 92 Ind. 200. 77 Ind. 542; *City v. Blakemore*, 17 Ind.

<sup>2</sup> *Wood v. Strother*, 76 Cal. 545; 318; *Stadler v. Roth*, 59 Mo. 400; *Kily v. Cranor*, 51 Mo. 541; *Halleck v.*

<sup>3</sup> *Balfe v. Johnson*, 40 Ind. 235; *Ball v. Balfe*, 41 Ind. 221. *Boylston*, 117 Mass. 469; *Parish v. Golden*, 35 N. Y. 462.

<sup>4</sup> *Balfe v. Johnson*, 40 Ind. 235-238.

<sup>5</sup> *Schertz v. People*, 105 Ill. 27.

<sup>6</sup> *Chamberlain v. City of Evansville*,

without interposing any objection. The weight of authority is very decidedly in favor of the rule that where there is jurisdiction the property owner who sees the improvement made and offers no objection until after the work has been done can not defeat the assessment upon the ground that the proceedings have not been regular.<sup>1</sup> There is not a great deal of diversity of opinion upon the general rule, but there is some conflict upon the question of what shall be considered jurisdictional matters, as well as upon the question of what errors the rule will preclude the property owner from making available for the defeat of the assessment. In some of the cases the rule is so narrowed as to be of little practical effect, for it is restricted to cases where the error or irregularity is not a substantial one, but this seems an unreasonable limitation of an equitable and salutary principle. It is evident that the courts have, in some instances, narrowed the rule, because they have concluded that, if it be applied, title may be lost, but this result, as we have heretofore shown, is not a necessary sequence, for the property owner may protect his title by doing equity, that is, by paying the assessment, and this he ought to do wherever he has re-

<sup>1</sup> *Katz v. Bedford*, 77 Cal. 319, S. C. 19 Pac. R. 523; *Rector v. Board*, 50 Ark. 116, S. C. 6 S. W. R. 519; *State v. Passaic*, 45 N. J. L. 146; *State v. Mayor, etc.*, 40 N. J. L. 244; *State v. City*, 7 Vroom, 159; *State v. Morristown*, 5 Vroom, 445; *Wright v. City* (Wash. Ter.), 19 Pac. R. 43; *Ritchie v. City* (Kan.), 16 Pac. R. 332; *People v. Goodwin*, 5 N. Y. 571; *Burlington v. Gilbert*, 31 Ia. 356; *Gilmore v. Fox*, 10 Kan. 509; *Patterson v. Baumer*, 43 Ia. 477; *Barker v. Omaha*, 16 Neb. 269; *Jackson v. Detroit*, 10 Mich. 248; *City of New Haven v. Fair Haven, etc.*, R. R., 38 Conn. 422, S. C. 9 Am. Rep. 399; *Kellogg v. Ely*, 15 Ohio St. 64; *Corry v. Gaynor*, 22 Ohio St. 584; *Walker v. City*, 1 Bailly Ch. Rep. 443; *Ross v. Stackhouse*, 114 Ind. 200; *Taber v. Ferguson*, 109 Ind. 227; *Powers v. New Haven*, 120 Ind. 185, S. C. 21 N. E. R. 183; *Rutland v. Pierpont* (Vt.), 17 Atl. R. 714; *Ferson's Appeal*, 96 Pa. St. 140; *Wiggin v. Mayor*, 9 Paige, 16; *Dows v. City of Chicago*, 11 Wall. 108; *Roachdale v. King*, 16 Beav. 630. Objecting on one ground estops a party from afterwards objecting on another ground. *Pepper v. Philadelphia*, 114 Pa. St. 96, S. C. 6 Atl. Rep. 899. *Contra*, *Starr v. Burlington*, 45 Ia. 87; *In re Sharp*, 56 N. Y. 257; *Wright v. Thomas*, 26 Ohio St. 346. It is difficult to reconcile *Wright v. Thomas*, *supra*, with *Neff v. Bates*, 25 Ohio St. 169, and *Kellogg v. Ely*, 15 Ohio St. 64; *Tone v. Columbus*, 39 Ohio St. 281; *Steckert v. East Saginaw*, 22 Mich. 104. Compare *Motz v. Detroit*, 18 Mich. 495.



ceived a benefit and the proceedings are not wholly unauthorized.<sup>1</sup>

It certainly deprives the principle of estoppel, as applied to local assessments, of practical value, to hold that it operates only where the errors and irregularities are not of a substantial character, for, irrespective of the element of estoppel or waiver, the better rule now is, that unimportant errors or immaterial deviations from the statute will not vitiate the assessment in cases where the work has been done and the complainant's property benefited.<sup>2</sup> The principle can only be of practical use and importance in cases where the errors are of a material character, for without it immaterial errors will be disregarded. There is sound reason for extending rather than for abridging the principle of estoppel in street assessment cases. In every instance where there is authority over the general subject, and the highway officers assuming to proceed under this authority assert jurisdiction of the particular case, the property owner who has knowledge of the proceedings and suffers them to be carried on, and the work completed under them, ought to be held to be estopped from contesting their validity. If he has knowledge of the proceedings, and knows that the work is being done under them, he can not avoid knowing what the law authorizes, and if he knows all this he ought to properly object or else pay the assessment, unless subsequent acts render it invalid.<sup>3</sup> The fact that a street is being improved by order of public officers ought to put the property owner upon enquiry, and to him should be applied the familiar rule that one put upon

<sup>1</sup> Appeal of the City of Pittsburgh, 118 Pa. St. 458, S. C. 12 Atl. R. 366; Barker v. Omaha, 16 Neb. 269. 825; Collins v. City (Mass.), 15 N. E. R. 908; Wewell v. City (Ohio), 15 N. E. R. 196.

<sup>2</sup> *In re Upson*, 89 N. Y. 67; Nicker-  
son v. Boston, 113 Mass. 306; Snow v.  
Fitchburg, 136 Mass. 179; Watson v.  
Philadelphia, 93 Pa. St. 111; Nevin v.  
Roach (Ky.), 5 S. W. R. 546; Kilmer  
v. People, 106 Ill. 529; Dyer v. Mar-  
tinovich, 63 Cal. 353; Lyth v. Buffalo,  
48 Hun. 175; Blair v. Luning (Cal.), 18  
Pac. Rep. 153; Walker v. District of  
Columbia, 6 Mackey, 352; Keese v.  
Denver, 10 Col. 112, S. C. 15 Pac. Rep.

<sup>3</sup> There is, at all events, no valid rea-  
son for applying the doctrine of estop-  
pel to mere errors or irregularities, for  
they are not available even on appeal  
where objection is not properly and  
seasonably interposed. It is, however,  
in cases of collateral attack that the  
doctrine of estoppel produces the best  
results, and in such cases justice de-  
mands that it be applied with a free  
hand.

enquiry is chargeable with notice of all the facts which a reasonably diligent investigation will disclose. Public works are undertaken, as every one knows, under authority delegated by law to public officers, and there is little or no reason why a property owner, who has full notice of what is being done, should be allowed to stand by in silence until the work is completed and then escape paying for the benefit his property has received.<sup>1</sup> If he would avoid this result he should act promptly, and if he fails he should not demand that the persons who have done the work should go unpaid. There has been, in many cases, we venture to affirm, a sacrifice of justice in the application of the abstract principle, right and just in itself, but harsh and unreasonable when carried beyond its proper limits; that the rights of the citizens can not be affected by proceedings *in invitum* unless the statute is rigidly adhered to, for that principle has been extended to cases to which it does not justly apply. The fundamental error is in assuming that a citizen who stands by until the work is done comes within the principle, for that principle does not aid those who seek to make it an instrument of injustice. If the party who assails the assessment has induced the officers to enter upon the work, his complaint should meet with no favor from the courts.<sup>2</sup>

It is not just to so extend an estoppel as to make it apply to matters of which the property owner did not have knowledge or as to which he was not chargeable with notice, nor is it just to hold him estopped from questioning subsequent proceedings. A property owner may know that a notice is defective and

<sup>1</sup> *Wiggin v. Mayor*, 9 Paige, 16; *Ferguson v. Landram*, 5 Bush. 230; *Lyons v. Cooledge*, 89 Ill. 529; *Pease v. Whitney*, 8 Mass. 93; *Peoria v. Kidder*, 26 Ill. 351; *Com. v. Thomas*, 32 Pa. St. 218; *Renick v. Ludington*, 20 W. Va. 511; *Warren v. Raymond*, 17 S. C. 163; *Vose v. Cockcroft*, 44 N. Y. 415; *Bridge Co. v. Stewart*, 3 How. 412; *Dows v. Chicago*, 11 Wall. 108; *City of Evansville v. Pfisterer*, 34 Ind. 36; *Montgomery v. Wasem*, 116 Ind. 343; *Jackson v. Smith*, 120 Ind. 520.

<sup>2</sup> *Wood v. Norwood Tp.*, 52 Mich. 32, S. C. 17 N. W. R. 229; *Burlington v. Gilbert*, 31 Ia. 364; *Lafayette v. Fowler*, 34 Ind. 140; *State v. Mitchell*, 31 Ohio St. 592; *Warren v. Grand Haven*, 30 Mich. 24; *Byram v. Detroit*, 50 Mich. 56; *Motz v. Detroit*, 18 Mich. 495; *Peoria v. Kidder*, 26 Ill. 351; *Sleeper v. Bullen*, 6 Kan. 300; *Pease v. Whitney*, 8 Mass. 93; *Ferson's Appeal*, 96 Pa. St. 140; *Ferguson v. Landram*, 1 Bush. 548.

waive objections, but because of this he can not be precluded from questioning what is afterwards done by the highway officers. By acquiescing in what is past the property owner does not approve what may be done in the future. It is, therefore, the right of a property owner to object in the mode pointed out by law to wrongs committed in proceedings subsequent to those which he has suffered to pass unchallenged. Nor can mere acquiescence, or even actual consent and an affirmative request confer jurisdiction of the subject where none is granted by law. Jurisdiction of the subject comes from the law alone and can not be given by the acts of the parties, but when jurisdiction of the subject exists parties may waive even constitutional rights, and this they may do even in criminal cases where life and liberty are at stake.<sup>1</sup> It is, therefore, not a stretch of judicial power nor a violation of principle to hold that there may be an effective waiver of objections in proceedings to enforce the collection of local assessments.

A party is, as a general rule, not estopped to deny the constitutionality of the statute which assumes to confer authority to order improvements and direct assessments by a mere failure to actively oppose improvements which he knows are being made. This is obviously the correct rule, for without a valid statute there can be no jurisdiction, and parties are incapable of conferring jurisdiction of the subject, although they may confer jurisdiction of the person. But when the doctrine is pressed farther there is much difficulty, for the rule as now established by the weight of authority is, that a party who procures or actively aids in procuring the enactment of an unconstitutional statute and accepts benefit under it can not question its validity.<sup>2</sup>

<sup>1</sup> *United States v. Sacramento*, 2 Mont. 239, S. C. 25 Am. Rep. 742; *Butler v. State*, 97 Ind. 378.

<sup>2</sup> *Ferguson v. Landram*, 1 Bush. 548, S. C. 5 Bush. 230; *State v. Mitchell*, 31 Ohio St. 592; *Van Hook v. Whitlock*, 26 Wend. 43; *Lee v. Tillotson*, 24 Wend. 337; *People v. Murray*, 5 Hill, 468; *Burlington, etc., R. R. Co. v. Stewart*, 39 Ia. 267; *Perryman v. Greenville*, 51 Ala. 507. In *Daniels v.*

*Tearney*, 102 U. S. 415, the court said: "It is well settled, as a general proposition, subject to certain exceptions not necessary to be here noted, that where a party has availed himself for his benefit of an unconstitutional statute, he can not, in a subsequent litigation with others not in that position, aver its unconstitutionality as a defence, although such unconstitutionality may have been pronounced by a competent judicial

It would require a very clear and strong case to warrant the application of this rule to street assessments and yet such a case is conceivable. The fact that such a rule exists proves that the courts will carry the principle of estoppel to great lengths in the interests of justice, and proves, also, that the courts which confine the operation of the principle of estoppel in assessment cases to mere irregularities have gone astray. If a party may be estopped to gainsay the validity of a statute he certainly may be precluded from asserting that statutory provisions, even of the most important character, have not been complied with by highway officers. At all events, it is quite clear that a just application of the principle of estoppel fully concludes a party who has induced the proceedings from afterwards denying their validity except upon the ground that there was an entire want of authority over the general subject.<sup>1</sup>

It is competent for the legislature, so long as it keeps within the limits of the constitution, to provide what questions may be tried and to deny a right to the trial of others in cases where the party delays until after the work has been completed.<sup>2</sup> The legislature can not dispense with any of the constitutional safeguards, but it can require a property owner to proceed before the work has been done and his property benefited. In providing the mode of procedure the legislature has a very broad discretion, and so long as it violates no provision of the constitution its enactments must be respected and enforced. It is within the power of the legislature to declare what steps shall be taken, and, having this power, it necessarily follows that it may provide that parties by failing to object shall be held to have waived objections. If there is power to prescribe the acts

tribunal in another suit. In such cases the principle of estoppel applies with full force and conclusive effect."

<sup>1</sup> *Ridgefield, etc., R. R. Co. v. Reynolds*, 46 Conn. 375; *Thatcher v. People*, 98 Ill. 632; *Logansport v. LaRose*, 99 Ind. 117; *Hickling v. Wilson*, 104 Ill. 54.

<sup>2</sup> *Lent v. Tillson*, 72 Cal. 404; *Board v. Silvers*, 22 Ind. 491; *Palmer v. Stumph*, 29 Ind. 329; *Martindale v.*

*Palmer*, 52 Ind. 411; *McGill v. Bruner*, 65 Ind. 421; *Ross v. Stackhouse*, 114 Ind. 200; *Taber v. Ferguson*, 109 Ind. 227; *Wiles v. Hoss*, 114 Ind. 371, S. C. 16 N. E. 800; *Balfe v. Lammers*, 109 Ind. 347; *Norfolk, etc., Co. v. Ely*, 95 N. C. 77; *Appeal of Houghton*, 42 Cal. 35; *King v. New York*, 36 N. Y. 182; *Matter of Commissioners, etc.*, 102 N. Y. 734.

that shall be done there is also power to declare when the performance of such acts shall be dispensed with, when they shall be regarded as waived, or when the party shall be held estopped to aver that they have not been performed.<sup>1</sup> If, for instance, the legislature has power to require notice inviting proposals it has power to declare when a party shall be concluded from averring that there was no notice, or, again, if the legislature may authorize the letting of contracts without advertising for proposals it may declare that an objection that there was no notice shall be unavailing unless made before a designated time and in a specified manner. It is a mistake to suppose that an enactment providing that objections shall not be available unless made before a specified stage in the proceedings has been reached, comes under the rule that the legislature can not enact a law providing that a recital of a fact shall conclude a party from denying its existence, for, in enacting that objections not made until after a specified stage in the proceedings has been reached shall not be available, the legislature simply declares a rule of procedure, and dispenses with an act which it had itself made necessary. It does no more in declaring an estoppel than what it might have done in the first instance.

It is the general rule that defective assessments may be validated by subsequent legislation.<sup>2</sup> If the word "defective" be

<sup>1</sup>The legislature may limit the time within which an action shall be brought against a municipal corporation. *Preston v. Louisville*, 84 Ky. 118. If time and opportunity are once given for a hearing there is due process and the constitutional provision is satisfied; all other matters of procedure are then the subject of legislative regulation. The restriction upon the legislature extends only to jurisdictional matters, the pleading and practice are matters committed to the wisdom and discretion of the law-making power. Iron rules, rigid and technical, provoke litigation without producing substantial good to any one.

<sup>2</sup>*Mattingly v. District of Columbia*,

97 U. S. 687; *Burgett v. Norris*, 25 Ohio St. 308; *Tift v. City of Buffalo*, 82 N. Y. 204; *Matter of Sackett, etc.*, 74 N. Y. 95; *People v. Mitchell*, 35 N. Y. 551; *Thompson v. Lee County*, 3 Wall. 327; *Allen v. Armstrong*, 16 Ia. 509; *Breevort v. Detroit*, 24 Mich. 322; *State v. Newark*, 34 N. J. 236; *Musselman v. City of Logansport*, 29 Ind. 533; *Johnson v. Board of Commissioners*, 107 Ind. 15; *Schenly v. Com.*, 36 Pa. St. 29; *State v. Newark*, 27 N. J. 185; *People v. Supervisors*, 20 Mich. 95. Errors may be cured although the matter is at the time in litigation. *People v. McDonald*, 69 N. Y. 362; *St. Joseph County v. Ruckman*, 57 Ind. 96.

taken in its limited signification the general rule is not subject to limitation, for the legislature may heal all errors and omissions in form but it can not validate what is essentially void, for a void thing can not be brought into force by any power. If there has been an omission of some act required by the constitution, or absolutely essential to confer jurisdiction, then there is much more than a defect; there is, in truth, an absolute want of power, and where there is a total want of power there can be no valid act, for acts done without power are absolutely void.<sup>1</sup> Proceedings that are void because the power to order or conduct them is lacking can not be validated,<sup>2</sup> but where there is power, defects may be healed. In declaring an act void it is affirmed that it neither has nor can have any validity,<sup>3</sup> but in declaring it voidable it is simply affirmed that there is some error which enables a party to avoid it. The distinction between void and voidable acts is often lost sight of, and the failure to mark it frequently leads to error, and this is especially true of assessment cases.

A leading purpose manifested in most of the statutes granting the authority to levy local assessments is to secure competition, and to effect this purpose it is usual to require the highway officers to advertise for proposals before awarding the contract. It is, therefore, with reason that the courts hold that where the proceedings are appropriately and seasonably assailed they will fail unless notice has been published and proposals have been invited as the statute directs.<sup>4</sup> Where the statute prescribes the

<sup>1</sup> *Kimball v. Rosendale*, 42 Wis. 407; *In re Second Avenue Church*, 66 N. Y. 395; *Matter of Hearn*, 96 N. Y. 378; *Blake v. People*, 109 Ill. 504; *Forster v. Forster*, 129 Mass. 559; *People v. McCune*, 57 Cal. 153; *State v. Doherty*, 60 Me. 504. "The General Assembly can not by an enabling act make that constitutional which directly is prohibited as unconstitutional." Per court in the Appeal of *The City of Scranton*, 113 Pa. St. 176. But, see *Righter v. Jersey City*, 45 N. J. L. 104; *State v. Jersey City*, 45 N. J. Law, 256.

<sup>2</sup> *Strosser v. City of Ft. Wayne*, 100

Ind. 443; *In re Robbins*, 82 N. Y. 131; *Maxwell v. Goetschius*, 40 N. J. L. 383, S. C. 29 Am. Rep. 242; *Silsbee v. Stockle*, 44 Mich. 561; *Brady v. King*, 53 Cal. 44; *Spaulding v. Nourse*, 143 Mass. 490; *Pitkin v. Springfield*, 112 Mass. 509.

<sup>3</sup> *Van Schaick v. Robbins*, 36 Ia. 201; *Pearsoll v. Chapin*, 44 Pa. St. 15; *Anderson v. Roberts*, 18 Johns. 527; *Crocker v. Bellangere*, 6 Wis. 645.

<sup>4</sup> *In re Rosebaum*, 6 N. Y. Sup. Ct. 184; *In re Pennie*, 108 N. Y. 364; *In re Marsh*, 88 N. Y. 423; *In re Merrian*, 84 N. Y. 596; *Baltimore v. Johnson*, 62 Md. 225; *City of Stockton v. White-*

time for which the notice shall be published, a failure to publish for the time specified will, unless some element of estoppel or waiver bars his way, enable the land owner to defeat the assessment in a direct proceeding.<sup>1</sup> If the statute declares what the notice shall specify, the notice must conform to the statute or the proceedings will fail.<sup>2</sup> In the absence of a statute designating what shall be stated in the notice it will be sufficient to so clearly and fully describe the improvement as to secure competition, invite proposals and enable competitors to make intelligent bids, but it is not necessary to enter into minute details.<sup>3</sup> Where the statute requires that specifications shall be prepared before advertising for proposals, the specifications must be so clear and full as to enable bidders to know what work is required, what materials are to be used, and what the general character of the proposed improvement is.<sup>4</sup> The improvement must be that ordered and for which proposals are invited and it is, therefore, necessary that the notice should give full and fair information to the end that all competing bidders may understand what improvement the highway officers propose to make.<sup>5</sup> It should appear that the notice was given by the proper authority.<sup>6</sup> In order to render available objections to the notice inviting proposals the property owner should, in cases where there is some

more, 50 Cal. 555; *Macy v. Titcomb*, 19 Ind. 135; *Yarnold v. Lawrence*, 15 Kan. 126; *Nash v. St. Paul*, 8 Minn. 172; *White v. New Orleans*, 15 La. Ann. 667; *State v. Barlow*, 48 Mo. 317; *Addis v. Pittsburgh*, 85 Pa. St. 379; *Hague v. Philadelphia*, 48 Pa. St. 527; *Breevort v. Detroit*, 24 Mich. 322; *Stuart v. Cambridge*, 125 Mass. 102.

<sup>1</sup>*City v. Puterbaugh*, 46 Ind. 550; *Moberry v. Jeffersonville*, 38 Ind. 198; *Baker v. Tobin*, 40 Ind. 310; *Yeakel v. City of Lafayette*, 48 Ind. 116; *Kretsch v. Helm*, 38 Ind. 207. Insufficiency of notice should be pleaded. *Taber v. Grafmiller*, 109 Ind. 206; *Taber v. Ferguson*, 109 Ind. 227.

<sup>2</sup>*Coggeshall v. City of Des Moines*

(Ia.), 41 N. W. Rep. 617. It was held in this case that where the statute required that the notice should contain "a description of the kind and amount of work to be done," a notice inviting proposals "for all the kinds of modern improvements now in use was insufficient."

<sup>3</sup>*Beniteau v. Detroit*, 41 Mich. 116; *Follomer v. Nuckolls*, 6 Neb. 204.

<sup>4</sup>*Bigler v. New York*, 5 Abb. N. Y. Cases, 51.

<sup>5</sup>*Mitchell v. Milwaukee*, 18 Wis. 92; *Wells v. Burnham*, 20 Wis. 112; *Hasbrouck v. Milwaukee*, 21 Wis. 217; *Nash v. St. Paul*, 11 Minn. 174.

<sup>6</sup>*City of Indianapolis v. Bly*, 39 Ind. 373.

notice, proceed promptly and in the mode prescribed by law,<sup>1</sup> but where there is no notice at all, the objection may be made available in a collateral attack in the absence of a statute declaring that after a given point has been reached no objections arising in prior proceedings shall be valid.<sup>2</sup> As the presumption is in favor of the regularity of the proceedings of highway officers where they have general jurisdiction of the subject, and as a land owner may be estopped by standing by, it would seem clear that one who makes no objection until after the work has been done and the benefit received, ought not to be allowed to defeat the assessment in a collateral proceeding.

In determining the degree of strictness to which highway officers should be held in awarding contracts for public work, the protection of the citizen is always the first and the highest consideration, but it ought, nevertheless, to be borne in mind that those officers have no private interest in the work and are simply discharging their duties as sworn officers of the public. There is abundant reason, therefore, for regarding their proceedings with much more favor than those of the officers of private corporations, who are influenced by motives of self-interest. The courts which apply to the officers of public corporations the same rules that they apply to the officers of private corporations do, as we believe, depart from sound principles. While the proceedings of highway officers should be held strictly within the limits of the authority conferred upon them, still there is yet much reason for declining to overturn their proceedings at the suit of a private citizen who has secured a special benefit, unless he shows that he has sustained a substantial injury. At all events, the courts should not deprive the contractor who has done the work which benefits the private property from showing that the owner assented to the proceedings and is estopped from questioning their validity. In holding that the notice inviting proposals is jurisdictional, we deferentially venture to suggest, there is a fundamental error and one which often does

<sup>1</sup> *Board v. Silvers*, 22 Ind. 491; <sup>2</sup> *Brookbank v. Jeffersonville*, 41 Ind. Martindale v. Palmer, 52 Ind. 411; 406; *Stuart v. City of Jeffersonville*, 41 Ind. 153.  
*Taber v. Grafmiller*, 109 Ind. 206; *Taber v. Ferguson*, 109 Ind. 227; *Clements v. Lee*, 114 Ind. 397.



substantial injustice to a party who has done work which has benefited the complainant, who is, consequently, in no situation to complain. We can not escape the conviction that the notice inviting proposals is an intermediate step following the acquisition of jurisdiction. We know, however, that the decided weight of authority is the other way, and it is with timidity that we go so far as to suggest a doubt as to the soundness of the generally accepted doctrine.

Where the statute requires that the contract shall be awarded to the lowest bidder, or to the best bidder, it is the duty of the highway officers to ascertain who, of the competing bidders, is entitled to the contract and award it to him.<sup>1</sup> They have really no choice; they must do what the statute commands, yet in some cases they must be permitted to exercise their discretion in determining who is the best bidder. They have no right arbitrarily or without sufficient grounds to make a discrimination, but, nevertheless, there may be instances in which they must investigate, and from the facts ascertained by investigation determine who is entitled to the contract. As the municipal corporation is liable for defects in its streets, and as it is in some instances responsible for the acts of those to whom it awards contracts for their improvement, it would seem that the officers should have some discretion in determining who shall be allowed to do the work. But it can not, of course, be held that they may, in any event, disregard the imperative commands of the statute.

The proposal made in response to an advertisement does not become a contract until acted upon by the proper officers, nor do the property owners or the persons making the proposal acquire a right to have it consummated by a contract.<sup>2</sup> It is for the body to whom is granted the general authority to award contracts to determine whether it is expedient to proceed with the improvement, and this right is not lost by advertising for proposals. It is not unlawful for the common council of a municipal corporation to reject all bids, nor is it improper for it to recon-

<sup>1</sup> *Whitney v. Hudson* (Mich.), 37 N. W. R. 184; *Beers v. Dallas City*, 16 38 N. W. R. 899.  
<sup>2</sup> *Mackey v. Columbus Tp.* (Mich.), Ore. 334, S. C. 18 Pac. R. 835.

sider its action rejecting bids, for that action may, within a reasonable time and before the intervention of the rights of third parties, be reconsidered, the bids accepted, and the contract awarded without again advertising for proposals.<sup>1</sup>

Contracts must, in order to give full regularity to the proceedings, be made in the cases and in the mode prescribed by the statute. Where the statute authorizes an improvement to be ordered at the expense of the property owners, and no such order is made, the city can not enforce an assessment against the property.<sup>2</sup> In a Colorado case the rule was applied with great strictness, for it was held that if the record fails to show an acceptance of the bid upon a call of the yeas and nays, the contract is not enforceable.<sup>3</sup> In another case it was held that a failure to designate the materials to be furnished vitiated the contract.<sup>4</sup> No other body or officer of a municipal corporation than the one designated by statute can make the contract,<sup>5</sup> but it is held that where the work is awarded by a committee and the proper body subsequently orders the committee to employ a superintendent to oversee the work, the contract is effective.<sup>6</sup>

In many of the States the statute requires that an estimate shall be made by an engineer or surveyor, and that the estimate so made shall be reported to the proper officers and acted on by them, and wherever this is required it is essential to the regularity of the proceedings that the estimate should be made and reported.<sup>7</sup> If the law is substantially complied with by the engineer in making the estimate, it will be sufficient, although

<sup>1</sup> *Ross v. Stackhouse*, 114 Ind. 200.

<sup>2</sup> *Newberry v. Fox*, 37 Minn. 141, S. C. 5 Am. St. R. 830. See *McDonald v. Mayor*, 68 N. Y. 23, S. C. 23 Am. R. 144; *Schumm v. Seymour*, 24 N. J. Eq. 143.

<sup>3</sup> *Sullivan v. Leadville*, 11 Col. 483, S. C. 18 Pac. R. 736.

<sup>4</sup> *Coggeshall v. Des Moines (Ia.)*, 41 N. W. R. 617; *Brown v. District of Columbia*, 127 U. S. 579.

<sup>5</sup> *Rens v. Grand Rapids (Mich.)*, 41 N. W. R. 263.

<sup>6</sup> *Main v. Fort Smith*, 49 Ark. 480, S. C. 5 S. W. R. 801.

<sup>7</sup> *City of Indianapolis v. Imberry*, 17 Ind. 175; *Peru, etc., R. R. Co. v. Hanna*, 68 Ind. 562; *Ray v. City of Jeffersonville*, 90 Ind. 567; *Goring v. McTaggart*, 92 Ind. 200; *Lufkin v. Galveston*, 56 Tex. 522. An order refusing to direct an estimate may be reconsidered and an estimate ordered. *Taber v. Ferguson*, 109 Ind. 227.

there may be some inaccuracies or omissions.<sup>1</sup> Where the estimate forms the basis of the assessment it should state the names of the property owners, describe the property assessed with reasonable certainty and designate the amount assessed against the property of each owner.<sup>2</sup> An estimate made by an engineer, surveyor or other officer authorized by law to make it, is, at least, *prima facie* correct, and the party who assails it assumes the burden of impeaching it.<sup>3</sup> This ruling rests upon the same general principle as that which underlies the rule that the certificates of architects, or other persons invested with authority to receive work, are deemed to be correct until the contrary is made to appear.<sup>4</sup>

An assessment in some form is always essential. An assessment may be made by adopting and confirming the estimate of an engineer, of viewers, of assessors, of a committee, or other lawful officers.<sup>5</sup> The judgment of the body having the power to levy the assessment is the act which gives the assessment force and validity, but if proper evidence is presented in the form of an estimate or a report, and it is adopted in due form by the proper board or body, the assessment is effective. In requiring an engineer or other officer to make the calculations, the governing body does not delegate authority to make the assessment unless it parts with the right to finally approve or re-

<sup>1</sup> Walker v. District of Columbia, 6 Mackey, 352. The adoption of the engineer's estimate makes it the act of the common council. Nevin v. Roach (Ky.), 5 S. W. R. 546. Where the statute requires it, an estimate of the cost of a proposed road must be made under oath, and it must describe the improvement. Gilmore v. Hentig, 33 Kan. 156, S. C. 5 Pac. R. 781; Hentig v. Gilmore, 33 Kan. 234, S. C. 6 Pac. R. 304. But a general description is sufficient, a detailed description is not required. Olson v. City of Topeka (Kan.), 21 Pac. R. 219.

<sup>2</sup> City of Indianapolis v. Imberry, 17 Ind. 175.

<sup>3</sup> Risly v. St. Louis, 34 Mo. 404; St. Joseph v. Anthony, 30 Mo. 537; St. Louis v. De Noue, 44 Mo. 136.

<sup>4</sup> Some of the courts hold that the decision of an architect or engineer is conclusive in the absence of fraud or mistake. Stevenson v. Watson, 48 L. J. C. P. D. 318; Oakwood Retreat v. Rathbone, 26 N. W. R. 742; Kirk v. Bromly Union, 2 Phill. 640. But we think that where the statute does not make the engineer's estimate conclusive, it is to be regarded as *prima facie* correct. Hartupee v. Pittsburgh, 97 Pa. St. 107.

<sup>5</sup> Nevin v. Roach (Ky.), 5 S. W. Rep. 546.

ject the estimate or report.<sup>1</sup> If the ultimate right of decision is retained unfettered, by such a board or body, there is no delegation of authority.

The assessment should contain such a description of the property upon which it is laid as will enable the officers whose duty it is to enforce it to properly convey title in the event of a sale.<sup>2</sup> A reasonably certain description is, however, all that is required. It must be such a description as will supply the means of identification and enable a surveyor to locate the specific property.<sup>3</sup> A description which would be sufficient in an ordinary deed from one citizen to another is generally sufficient, although there may be exceptions to this rule. It is not just to assume that the proceedings are necessarily hostile to the interests of the property owners, for the officers who direct them occupy the position of public officers discharging a sworn duty, and the law which authorizes them to levy the assessment proceeds upon the theory that the improvement is for the benefit of the owners of the property assessed.<sup>4</sup>

The persons against whose property the assessment is directed should be identified in some appropriate method, and this is generally done by naming them.<sup>5</sup> It is obvious, however, that it is not always possible to accurately name the owners, and where this is so it seems unjust to deny any force to the assessment. If the property is well described and the officers have done all that reasonable diligence enabled them to do, the assessment should be upheld. Immaterial inaccuracies in naming the owners ought not to be allowed to defeat the proceedings.<sup>6</sup>

<sup>1</sup> *Ray v. City of Jeffersonville*, 90 Ind. 567; *City of Indianapolis v. Imberry*, 17 Ind. 175. *Rucker v. Steelman*, 73 Ind. 396.

<sup>2</sup> *In re New York, etc., R. R.*, 90 N. Y. 342.

<sup>3</sup> *People v. Stahl*, 101 Ill. 346; *State v. Mulford*, 43 N. J. L. 550; *Hannah v. Collins*, 94 Ind. 203; *Orono v. Veasey*, 61 Me. 431; *Hewes v. Reis*, 40 Cal. 261. The office of a description is not to identify the particular parcel of property, but to supply the means of identi-

fication. *Judge Cooley* ably opposes the doctrine that the proceedings in tax cases are hostile to the rights of the citizen, and there is as much reason, if not more, for opposing such a doctrine in cases of assessments for local improvements. *Cooley on Taxation* (2d ed.), 404, n.

<sup>5</sup> *Bennett v. City of Buffalo*, 17 N. Y. 383.

<sup>6</sup> *Kendig v. Knight*, 60 Ia. 29.

Where the assessment is made by a municipal corporation, and for the improvement of a street, there is much reason for giving little weight to errors in names if the property assessed is properly described, since from the nature of the proceedings and the character of the improvement it is hardly conceivable that an owner can be ignorant of what has been done, and if he knows the facts, he must know, as matter of law, that his property is liable for the assessment. There is much conflict in the cases as to whether it is sufficient to name the owner as "the estate of Aaron Smith, deceased," or "as the heirs of Toland, deceased," but it seems that, ordinarily, such an identification of the owner or owners should be deemed sufficient;<sup>1</sup> it certainly should be so where the records will not enable a diligent searcher to identify the owner or owners with more accuracy. Where the owner is, in fact, unknown, it will be sufficient to assess the property to "owner unknown."<sup>2</sup> To require more than a careful search of the record is to require, without sufficient reason, an extraordinary thing to be done, and this no just principle will warrant.

Whether there is a lien for the assessment levied for the repair or improvement of a street depends entirely upon the provisions of the statute. Liens of the class to which assessment liens must be assigned are statutory, and their existence, force and extent depend upon the statute which creates them.<sup>3</sup> There can be no doubt that the legislature may declare that a lien shall fasten upon the property as against the owner and all who acquire rights subsequent to the time the lien attaches.<sup>4</sup>

<sup>1</sup> *Ronkendorf v. Taylor*, 4 Peters (U. S.), 349; *Wheeler v. Anthony*, 10 Wend. 346; *State v. Collector*, etc., 4 Zab. (N. J.) 108; *Pond v. Negus*, 3 Mass. 230; *Williams v. School District*, 21 Pick. 75; *Dickison v. Reynolds*, 48 Mich. 161; *Noble v. City of Indianapolis*, 16 Ind. 506; *Sloan v. Sewell*, 81 Ind. 180; *Jenkins v. Rice*, 84 Ind. 342; *Carr v. State*, 103 Ind. 548; *Eads v. Retherford*, 114 Ind. 273; *Moale v. City of Baltimore*, 61 Md. 224.

<sup>2</sup> *Nichols v. McGlathery*, 43 Ia. 189;

*Rapp v. Lowry*, 30 La. Ann. 1272; *Oliver v. Robinson*, 58 Ala. 46.

<sup>3</sup> *State, ex rel., v. The Ætna Life Ins. Co.*, 117 Ind. 251; *Gause v. Bullard*, 16 La. Ann. 197; *Philadelphia v. Greble*, 38 Pa. St. 339; *Allegheny City's Appeal*, 41 Pa. St. 60.

<sup>4</sup> *Fitch v. Creighton*, 24 How. 159; *Vreeland v. Jersey City*, 37 N. J. Eq. 574; *People v. Brooklyn*, 4 N. Y. 419; *Walsh v. Matthews*, 29 Cal. 123; *Emery v. Bradford*, 29 Cal. 75; *Philadelphia v. Tryon*, 35 Pa. St. 401; *Wright v. Bos-*

The lien may be given upon the separate property of a married woman, for it is created by the sovereign power which may impose or remove disabilities.<sup>1</sup> It attaches at the time fixed by the statute,<sup>2</sup> and parties who acquire interests subsequent to that time will be treated as purchasers *pendente lite*.<sup>3</sup> But it does not displace prior estates in the land unless the statute by express words or fair implication so provides.<sup>4</sup> It has been held that where the statute conferred authority upon a city "to provide by ordinance for the prompt collection of taxes due to the city and to that end the city shall have power to sell real as well as personal property," it might enact an ordinance declaring a lien.<sup>5</sup>

Local assessments levied to pay the expense of improving or repairing streets are levied under the same general sovereign power which is exercised in levying general revenue taxes. While it is true that an assessment is not strictly a tax it is also true that it is levied by the sovereign power, for the general public good. It is also true that a mortgagee is benefited to the extent that the land is improved, for to the extent that the land is improved to that extent is its value augmented. We can not perceive why it is not in the power of the legislature to create a lien and give it priority over all private rights or estates. This would seem to surely follow from what we have affirmed, and there is yet another reason and that is this, every one who acquires an interest in land takes it subject to the right of the sovereign to lay general taxes upon it and to impose upon it the burden of paying the expense of public improvements which confer upon the land a special benefit. We feel that it

ton, 9 Cush. 233; *New York v. Colgate*, 12 N. Y. 149.

<sup>1</sup> *Leavenworth v. Stille*, 13 Kan. 539.

<sup>2</sup> *Jones v. Schulmeyer*, 39 Ind. 119, *Langsdale v. Nicklaus*, 38 Ind. 289.

<sup>3</sup> *Chaney v. State*, 118 Ind. 494.

<sup>4</sup> *Cook v. State*, 101 Ind. 446. But we think that it does not require express words to authorize the inference

that the statute intended to make the lien paramount.

<sup>5</sup> *Eschbach v. Pitts*, 6 Md. 71; *Dallam v. Oliver*, 3 Gill. (Md.) 445. Some of the cases hold that the contractor is subrogated to the lien of the city. *Philadelphia v. Wistar*, 35 Pa. St. 427. Compare *Griffing v. Pintard*, 25 Miss. 173.

is entirely safe to affirm that the legislature may make the lien a paramount one.<sup>1</sup>

Statutes giving a lien are remedial and therefore to be liberally construed and so construed as to accomplish the legislative purpose.<sup>2</sup> In creating liens for improvement assessments the legislature makes secure compensation for what is in truth an industrial annexation to the land, for the road or street improved is in a sense an appurtenance of the land which increases its value. Whoever holds an interest in the land profits by the appurtenance and ought, in justice, be subjected to the lien which secures the assessment. It is, for these reasons, often proper to deduce from the general language of a statute giving a lien the conclusion that it gives a paramount lien to which mortgage estates or judgment liens must yield. But this conclusion can not, perhaps, be inferred where no provision is made for giving those who hold such interests a hearing, and where there are no words declaring the superiority of the lien.

As the lien of an assessment is the creature of statute it may be modified, or, as some of the cases hold, entirely destroyed by statute.<sup>3</sup> But we can not yield assent to the extreme views of some of the courts upon this subject. We can scarcely conceive a more unjust holding than one that would deprive a contractor of a right to enforce an assessment lien in a case where he has done work and can not secure compensation except by enforcing a lien upon the property benefited by his money and his work. We are thoroughly satisfied that where a statute gives a lien as the security for the assessment, and work is done

<sup>1</sup> *Provident, etc., Inst. v. Jersey City*, 113 U. S. 596; *State v. Ætna, etc., Co.*, 117 Ind. 251. Such liens it has been held are given by virtue of the taxing power of the State. *Moffatt v. Henderson*, 18 J. & S. (N. Y.) 211.

<sup>2</sup> *Eckhard v. Donohue*, 9 Daly, 214; *Hudler v. Golden*, 36 N. Y. 447; *Weed v. Tucker*, 19 N. Y. 422.

<sup>3</sup> *Bangor v. Goding*, 35 Me. 73; *Gray v. Carleton*, 35 Me. 481; *Frost v. Ilsley*, 54 Me. 345; *Watson v. New York Central R. R. Co.*, 47 N. Y. 157; *Hall v.*

*Bunte*, 20 Ind. 304; *Martin v. Hewitt*, 44 Ala. 418. It is impossible to avoid the conclusion that upon this subject there is conflict in the decisions of the Supreme Court of the United States. The later cases modify the earlier and sustain our conclusion. *Walker v. Whitehead*, 16 Wall. 314; *Antoni v. Greenhow*, 107 U. S. 766; *Edwards v. Kearzey*, 96 U. S. 595; *Van Hoffman v. Quincy*, 4 Wall. 535; *Black Const. Prohibitions*, sections 133, 136.

upon the faith of the security thus provided, the legislature can not destroy the lien and leave the contractor remediless. The contractor's right in such a case is so far vested as to be within the protection of the constitution. The case of a contractor is essentially different from that of one who buys land at a tax sale, and the cases which hold (and they are of doubtful soundness) that the repeal of a statute giving a lien for taxes takes away the lien are not controlling, if, indeed, they are at all relevant or analogous. The conclusion which we assert seems to us to rest on solid principle, and it finds support from many well considered cases.<sup>1</sup> In the case of a contractor asserting a lien there is, we may add, more than the assertion of a right to a remedy for there is an assertion of a right to a security provided by law.

The mode prescribed by statute for the enforcement of local assessments must ordinarily be pursued, for the whole system is purely of statutory origin and creation. It is within the power of the legislature to provide the mode of procedure, and, within constitutional limits, its discretion is unfettered. It may provide for the collection of assessments in a summary method, or it may provide for their collection by an ordinary suit in equity or in an appropriate action at law. Whatever steps the statute requires must be taken or no title will pass upon the sale on the assessment.<sup>2</sup> But it does not follow that the failure to take the steps required by law to authorize a sale of the property will prevent the collection of the assessment, for if the assessment is valid, errors may be rectified in the proceedings taken to collect it, and its collection ultimately enforced. In cases where the assessment is valid the necessary steps may be taken, and the collection of the assessment may be made by a sale of the property. The contractor whose work has benefited the property owner does not necessarily lose his claim when errors

<sup>1</sup> *Wabash and Erie Canal v. Beers*, 2 Mo. 613; *In re Hope Mining Co.*, 1 Black. 448; *Streubel v. Milwaukee, etc., Co.*, 12 Wis. 67; *Hallahan v. Herbert*, 11 Abbott's Pr. N. S. 326; *Chowning v. Barnett*, 30 Ark. 560; *Handel v. Elliott*, 60 Texas, 145; *Weaver v. Sells*, 10 Kan. 609; *Hoffman v. Walton*, 36

*Saw*, 710.

<sup>2</sup> *Goring v. McTaggart*, 92 Ind. 200; *Wilson v. Poole*, 33 Ind. 443; *Himmelman v. Townsend*, 49 Cal. 150; *Hancock v. Bowman*, 49 Cal. 413.



occur in the proceedings subsequent to the levying of a valid assessment, although such errors may be sufficient to defeat a sale. It is one thing to defeat a sale and quite another to totally overthrow the assessment. A valid assessment is neither paid nor destroyed by an error in the proceedings which follow it.

Upon the same principle which requires the contractor or corporation seeking to enforce an assessment to pursue the mode prescribed by statute, it is rightly held that the assessment can only be collected from the property or fund which the law, or the contract made under the law, renders liable. The statute alone authorizes the assessment and it can only be collected from property or funds made liable by law for its payment. It is not a general claim against either the public corporation or the property owner.<sup>1</sup> It is held by some of the courts that the public corporation may by contract render itself liable,<sup>2</sup> and by others that it may do so by a breach of duty.<sup>3</sup> The doctrine that a breach of duty will render the public corporation liable to pay for an improvement which has conferred a special benefit upon a property owner has a very slender support in principle, if, indeed, it has any support at all, unless it is limited to cases where the public corporation secures and misappropriates the money collected on the assessment. It is not just to compel the citizens generally to pay for a special benefit, and this is done by taking money out of the corporate treasury to pay a local assessment. Public corporations are instrumentalities of government, and their officers are public officers with defined and

<sup>1</sup> *Chicago v. People*, 48 Ill. 416; *Maier v. Chicago*, 38 Ill. 266; *Whalen v. La Crosse*, 16 Wis. 271; *Finney v. Oshkosh*, 18 Wis. 209; *Kearney v. Covington*, 1 Metc. (Ky.), 339; *Craycraft v. Selvage*, 10 Bush. 696; *Rupert v. Baltimore*, 23 Md. 184; *Leavenworth v. Rankin*, 2 Kan. 357; *Casey v. Leavenworth*, 17 Kan. 189; *New Albany v. Sweeney*, 13 Ind. 245; *Johnson v. Indianapolis*, 16 Ind. 227; *Lucas v. San Francisco*, 7 Cal. 463; *Goodrich v. Detroit*, 12 Mich. 279; *Second National Bank v. Lansing*, 25 Mich. 207; *Hunt v. Utica*, 18 N. Y. 442; *Lovell v. St. Paul*, 10 Minn. 290; *Beard v. Brooklyn*, 31 Barb. 142; *Swift v. Williamburgh*, 24 Barb. 427.

<sup>2</sup> *Morgan v. Dubuque*, 28 Ia. 575; *Cronan v. Municipality*, 5 La. Ann. 537; *Chicago v. People*, 56 Ill. 327; *Louisville v. Nevin*, 10 Bush. 549.

<sup>3</sup> *Leavenworth v. Mills*, 6 Kan. 288; *Chaffee v. Granger*, 6 Mich. 51; *Lansing v. Van Gorder*, 24 Mich. 456.

limited authority, and the contractor ought to satisfy himself that the assessment can be collected from those who are benefited, and this he can do by looking into the law and examining public records which are open to inspection. The officers who fail in their duty are not the corporation, for that is composed of the citizens of the locality, and the corporate officers are as much the representatives of the citizens specially benefited as of any of the others. If these officers fail to do their duty they can be coerced by mandate, and to this remedy the contractor should be confined,<sup>1</sup> for it is far more just and reasonable to impose upon him the duty of watching the proceedings than it is to impose it upon the citizens generally, who, having no special interest in the proceedings, have a right to presume that the officers have done their duty. It is for those especially interested to secure obedience to law, and not for those who are citizens having no peculiar or special interest in the proceedings. Those only who are lacking in vigilance and diligence should suffer, and not those resting under no duty demanding diligence and occupying no position requiring vigilance. If the money taken out of the corporate treasury to pay for the improvement came from the derelict officers alone, there would be much justice in holding the public corporation liable for their default; it does not, however, come from them, but from the citizens who constitute the governmental corporation. It is just enough to make the officers do their duty, but it is an unjustifiable burden to impose upon all the citizens the payment of money for an improvement which specially benefits specific property.

It is quite clear upon principle and authority that where there is jurisdiction, the assessment must be assailed in the manner prescribed by the statute in all cases where the statute prescribes a mode of attacking assessments, except in cases where there are grounds of equitable cognizance. Where an appeal is given, that is always the proper mode unless other modes are also pro-

<sup>1</sup> *Wren v. City of Indianapolis*, 96 Ind. 206; *City of Greenfield v. State*, 113 Ind. 597; *People v. Flogg*, 46 N. Y. 401; *Shoolbred v. Charleston*, 2 Bay (S. C.), 63; *Reock v. Newark*, 33 N. J. L. 129; *Himmelman v. Coffran*, 36 Cal. 411; *State v. Keokuk*, 9 Ia. 438.

vided by the statute, or there is some ground for relief in equity. We have discussed this subject in discussing the question of procedure in condemnation proceedings,<sup>1</sup> and what is there said substantially applies to local assessments for the improvement or repair of roads and streets. It may, however, be appropriately added that where a statutory remedy is given, that remedy must be pursued unless it is shown to be inadequate or inappropriate.<sup>2</sup>

Where the validity of an assessment is directly challenged by appeal, a defence founded upon a failure to comply with the material requirements of the statute would unquestionably be effective unless waived or barred by an estoppel. In order to afford the contractor an opportunity to show a waiver or estoppel, it would seem to be necessary that the property owner should plead his defence affirmatively in order that the contractor might reply the waiver or estoppel.<sup>3</sup> But no general rule can safely be laid down upon this subject, since the question is in a great measure dependent upon the statutory provisions. It is generally provided in those jurisdictions where an appeal is authorized that the property owner may show that the work has not been done according to the contract. If it does appear that the work has not been done according to contract, it is doubtful whether there can be any recovery at all; there is, however, reason for allowing the contractor the reasonable value of the work done where he has proceeded under the contract. We suppose that there could not, in any event, be a recovery if it should appear that there was a radical and material departure from the contract in the character of the work, since it must be true that if the work does not fairly and substantially conform to the provisions of the ordinance or resolution on which the contract is founded, the property owner is assessed without notice, as he could not have notice of any other work than that for which the ordinance, resolution, or order provides.

In jurisdictions where the statute makes it the duty of the

<sup>1</sup> *Nichols v. Salem*, 14 Gray, 490; *Young v. Sellers*, 106 Ind. 101; *Cauld-Reckner v. Warner*, 22 Ohio St. 275; *well v. Curry*, 93 Ind. 363.

*Parham v. Justices*, 9 Ga. 341.

<sup>3</sup> *Sims v. Hines*, 121 Ind. 534; *Taber*

<sup>2</sup> *Sunier v. Miller*, 105 Ind. 393; *v. Ferguson*, 109 Ind. 227.

engineer or other officer of the municipality to examine and accept the work, the estimate of such officer, issued after an examination, is, as we have seen, at least *prima facie* evidence that the work has been done according to contract, so that, in such jurisdictions the burden of showing that the work has not been done according to the contract is upon the property owner. This conclusion necessarily results, if it be granted that the estimate is *prima facie* evidence of the due performance of the work, and this is the force generally assigned it; indeed, some of the authorities assert that the estimate is conclusive. We do not, however, regard it as conclusive in any case where it is not expressly made so by statute, and we have, in truth, serious doubt whether it is within the legislative power to make the estimate conclusive.

Where the statute expressly limits the time within which an assessment shall be enforced, the proceedings for its enforcement must, of course, be commenced within the time prescribed and such cases are free from difficulty. But where there is no special statute upon the subject there is some difficulty in determining whether the case falls within the limitation prescribed for actions upon written contracts, or within some other statutory limitation, or whether the general statute has any application at all. It was held in a well considered case that municipal corporations are not within ordinary limitation statutes, and that an action to recover an assessment against a street railway company was not barred by lapse of time.<sup>1</sup> The ruling in the case referred to is sustained by the decisions in cases of tax assessments and other analogous cases.<sup>2</sup> In other cases it has been expressly ruled that the ordinary statute of limitations does not apply to proceedings to enforce the collection of assessments for the improvement of streets.<sup>3</sup>

<sup>1</sup>The District of Columbia v. The Washington and Georgetown Railroad Co., 1 Mackey, 361.

<sup>2</sup>Pease v. Howard, 14 Johns. 479; Newcomer v. Keedy, 2 Md. 19; Hogan v. Ingle, 2 Cranch. C. C. 355; Baltimore and Ohio R. R. Co. v. District of Columbia, 3 MacArthur, 122; State Bank v. Brown, 1 Scam. (Ill.) 106.

<sup>3</sup>Eschbach v. Pitts, 6 Md. 71; Magee v. Com. for use of City of Pittsburgh, 46 Pa. St. 358. In the case last named the court said: "The statute of limitations has no application to assessments under the acts, and the objection is grounded upon a misapprehension of the powers of the legislature."

Injunction is sometimes an appropriate remedy in assessment cases.<sup>1</sup> Where this remedy is invoked before the work has been done and the complainant's property benefited very different rules apply from those which prevail where the owner delays until after the work has been completed. One who asks the writ before the work has been done or rights have been acquired under the contract is in a very much better situation than one who has not exercised such diligence. A much more liberal rule should govern in cases where the writ is asked before rights have been acquired, for such a case is not embarrassed by any element of waiver or estoppel. There is a solid and substantial reason for discriminating between the two classes of cases, but unfortunately the distinction is not always observed. There is likewise, as appears from what we have already said, a very satisfactory reason for discriminating between cases where the complainant seeks merely to prevent a sale and cases where he seeks to entirely overthrow the assessment. In the first case, if he tenders the amount of the benefits and seeks a removal of the cloud upon his title, he occupies a position which entitles his complaint to favorable consideration.

An injunction is justly demandable where the highway authorities illegally exempt property from the assessment, thus adding to the burden of the complaining owner,<sup>2</sup> but it is not de-

<sup>1</sup> In the case of *Paulson v. The City of Portland*, 16 Ore. 450, it was held that injunction would lie where it was physically impossible that the improvement could benefit the land, but this doctrine seems to us indefensible upon principle unless it be true that the statute gave the property owner no opportunity to be heard either in the court of original jurisdiction or on appeal. The question of benefit, it is settled, is one to be determined by the tribunal to whom the statute commits it, not by a chancellor. A somewhat similar question was presented in *Hanscom v. City of Omaha*, 11 Neb. 37, and the court there discriminated the case before it from *Hurford v. Omaha*, 4 Neb. 336, and held that where it appeared that

there could be no special benefit there could be no valid assessment. The decision is placed upon the peculiar provisions of the constitution and upon the further ground that the assessment was fraudulent, for it was said that: "It is sufficient to say that the finding is a fraud on its face."

<sup>2</sup> *Weeks v. Milwaukee*, 10 Wis. 242; *Hersey v. Supervisors*, 16 Wis. 198; *Hassen v. City of Rochester*, 65 N. Y. 516. But, as we suppose, this rule can not prevail where there has been a waiver by a failure to object in season or by a standing by under such circumstances as to create an estoppel. Nor do we believe it can apply where the work has been done and there is a remedy by appeal or *certiorari*.

mandable, as of right, where it appears that no injury has accrued, or can accrue, to the complainant from the illegal exemption, since it is of the very essence of the right to an injunction that the threatened injury should, if not prevented, do serious injury to the plaintiff. A fraudulent assessment may be enjoined,<sup>1</sup> but an injunction will not be awarded even if there is an over estimate of benefits, if the over estimate is simply the result of an error of judgment.<sup>2</sup> If it appears that the assessment has been purposely made on an unfair basis in order to relieve some and burden others, the collection of so much of the assessment as is shown to be unjust will be enjoined.<sup>3</sup>

Where the highway authorities have no general jurisdiction of the subject, injunction is the appropriate remedy. If constitutional requirements have been disregarded, the proceedings will be enjoined, and so they will be if no steps have been taken to acquire jurisdiction, unless the property owner has estopped himself from complaining or has waived his rights. Where the highway officers attempt to assess property not subject to assessment, or to assess property outside of their territorial jurisdiction injunction will lie.<sup>4</sup>

Where there is no element of waiver or estoppel, a land owner may maintain injunction to prevent the award of a contract without due advertisement, and to prevent disobedience of the statutory requirement that the contract be awarded to the lowest bidder.<sup>5</sup> But where bids are received pursuant to an ad-

<sup>1</sup> *Merrill v. Humphrey*, 24 Mich. 170; *Chicago, etc., v. Cole*, 75 Ill. 591; *Wright v. Railroad Co.*, 64 Ga. 783.

<sup>2</sup> *Rhea v. Umatilla Co.*, 2 Ore. 300; *Gage v. Evans*, 90 Ill. 569; *Du Page v. Jenks*, 65 Ill. 272; *State v. Jersey*, 4 Zab. (N. J.) 118; *Hoke v. Perdue*, 62 Cal. 545; 1 High on Injunctions, section 485, n. 2.

<sup>3</sup> *Cummings v. National Bank*, 101 U. S. 153; *Pelton v. National Bank*, 101 U. S. 143. But it seems that the assessment will be vacated only to the extent to which it is illegal. *Strusburgh v. Mayor*, 87 N. Y. 452; *In re Hughes*, 93 N. Y. 512. As we have

heretofore said, where part of the assessment is legal the complainant ought to do equity by tendering that part. *Barker v. City of Omaha*, 16 Neb. 269; *Cook v. City of Racine*, 49 Wis. 244. <sup>4</sup> *Balfé v. Lammers*, 109 Ind. 347; *City of Ft. Wayne v. Shoaf*, 106 Ind. 66; *Temple Grove Seminary v. Cramer*, 98 N. Y. 121; *Fremont v. Boling*, 11 Cal. 380; *Teegarden v. Davis*, 36 Ohio St. 601; *Curry v. Jones*, 4 Del. Ch. 559; *Bouldin v. Mayor*, 15 Md. 18.

<sup>5</sup> *Mayor v. Johnson*, 62 Md. 225; *Follmer v. Nuckolls Co.*, 6 Neb. 234; *Schumm v. Seymour*, 9 C. E. Green, 143; *Board of Comm'rs of Benton Co.*

vertisement inviting proposals, the local authorities have a right, within reasonable limits, to consider and determine who is the lowest or the best bidder, and if they act in good faith and with reasonable discretion the courts will not assume to control their judgment by injunction.<sup>1</sup> Where there is no petition an injunction will be awarded.<sup>2</sup>

Irregularities or errors not jurisdictional can not ordinarily be made available in a suit for injunction. The question whether the work has been done according to contract is one to be tried at law and not in injunction proceedings.<sup>3</sup> In a suit for injunction the question whether the yeas and nays were taken on the passage of the ordinance directing the improvement can not be litigated.<sup>4</sup> It may safely be affirmed, without multiplying illustrations, that where nothing more than errors or irregularities in the proceedings appear an injunction will not be awarded, unless it is applied for before the work has been done, and even then the writ will not issue if the errors are not of a material character, nor will it issue if there is an adequate remedy at law.<sup>5</sup>

*v. Templeton*, 51 Ind. 266; *Crabtree v. Gibson*, 78 Ga. 230.

<sup>1</sup>*Cleveland, etc., Co. v. Board, etc.*, 55 Barb. 288. See *Brevoort v. Detroit*, 24 Mich. 322.

<sup>2</sup>*Town of Covington v. Nelson*, 35 Ind. 532; *Makemson v. Kauffman*, 35 Ohio St. 444. See *Dennison v. City of Kansas*, 95 Mo. 416; *Dinwiddie v. Town of Rushville*, 37 Ind. 66.

<sup>3</sup>*Ricketts v. Spraker*, 77 Ind. 371; *McCafferty v. McCabe*, 4 Abb. Pr. R. 87, S. C. 13 How. Pr. R. 275.

<sup>4</sup>*Balfé v. Lammers*, 109 Ind. 347.

<sup>5</sup>*Le Roy v. Mayor*, 20 John. 430; *Heywood v. City of Buffalo*, 14 N. Y. 541; *Lenon v. Mayor*, 55 N. Y. 363; *Tingue v. Village of Rochester*, 101 N. Y. 294; *Kennedy v. City of Troy*, 77 N. Y. 493, distinguishing *Clark v. Village of Dunkirk*, 75 N. Y. 612; *Western, etc., Co. v. Nolan*, 48 N. Y. 513; *Wright v. Tacoma*, 3 Wash. Ter. 410, S. C. 19 Pac. R. 42; *Old Colony, etc.*,

*v. Fall River*, 147 Mass. 455, S. C. 18 N. E. R. 425; *Brush v. Carbondale*, 78 Ill. 74; *McDonald v. Payne*, 114 Ind. 359; *Sunderland v. Martin*, 113 Ind. 411; *People v. McCreery*, 34 Cal. 433; *Williams v. School District*, 21 Pick. 75; *Weeks v. Milwaukee*, 10 Wis. 242. For a statement of an exception to the general rule, see *Enos v. Mayor*, 68 N. Y. 617; *Clark v. Village of Dunkirk*, 75 N. Y. 612, S. C. 12 Hun. 181. It is somewhat difficult, it may be noted in passing, to see the grounds for excepting *Clark v. Village of Dunkirk* from the general rule. It is held in the matter of *McConnell*, 74 Cal. 217, S. C. 15 Pac. R. 746, that where an appeal is given by statute a *certiorari* will not be awarded. In the case of *Williamson v. Boykin*, 99 N. C. 238, S. C. 5 S. E. R. 378, it is held that where the complainant fails to perfect his appeal in time a writ of *certiorari* will be denied.

The presumption is in favor of the proceedings of the officers acting under the law, and it is incumbent upon the plaintiff to overcome it.<sup>1</sup> An objection not appropriately presented can not be made available,<sup>2</sup> nor will an application to vacate or enjoin the assessment be entertained unless it is seasonably made.<sup>3</sup> The complainant must show a substantial injury peculiar to himself; he can not have an injunction where it appears that there are two modes of procedure, unless he shows by appropriate averments that the one specially injurious to him will be pursued.<sup>4</sup>

<sup>1</sup>In *Matter of Hebrew, etc., Asylum*, 70 N. Y. 476; In *matter of Voorhes*, 90 N. Y. 668; In *matter of Bassford*, 50 N. Y. 512; *Tingue v. Village of Port Chester*, 101 N. Y. 294; *In re Brady*, 85 N. Y. 268; *In re Mutual, etc., Co.*, 89 N. Y. 530. It is true these cases mainly rest upon a statute, but we think they are right independent of statutory provisions.

<sup>2</sup>*Matter of Eager*, 46 N. Y. 109; *Matter of Clark*, 31 Hun. 198; *Rich's*

case, 12 Abbott's Pr. R. 118; In the *matter of Smith*, 65 Barb. 283. The case last cited has been overruled, but not as to the point upon which it is here cited.

<sup>3</sup>In *matter of Brady*, 47 N. Y. Superior Ct. (J. & S.) 36; *People v. Utica*, 65 Barb. 9; *Matter of Lord*, 78 N. Y. 109; *State v. Jersey City*, 35 N. J. L. 535; *State v. Newark*, 30 N. J. L. 303; *Chinn v. Trustees*, 32 Ohio St. 236.

<sup>4</sup>*Steffin v. Hill*, 16 Ore. 232.



## CHAPTER XXIII.

### NEGLECT OF DUTY TO REPAIR.

In England the parishes are charged with the repair and maintenance of all roads lying within their limits, unless by custom or prescription the burden is thrown upon particular persons.<sup>1</sup> In the United States, townships and counties usually have control over suburban highways and are often required by statute to repair their roads, but this is by no means invariably true, as we have heretofore shown. In cities and incorporated towns the streets are ordinarily under the control of the municipal authorities.

The entire matter of the maintenance of roads and streets is, in this country, largely regulated by statute. For no matter in what locality a highway may be, it is for the use of the public at large, and is, therefore, subject to legislative control.<sup>2</sup> In most of the States, cities are given extensive powers, either by charter or by general statute, over the streets within their limits, and are held to corresponding duties and liabilities. By many of the courts, the duty to maintain and repair streets is held to be implied where the city is given exclusive control

<sup>1</sup> *Rex v. Great Broughton*, 5 Burr. 2700; *Queen v. Horley*, 8 L. T. (N.S.) 382; *Rex v. St. George*, 3 Campb. 222; *Austin's Case*, 1 Ventr. 183, 189. And, see *Hill v. Boston*, 122 Mass. 344. So, in Canada, but in neither country are they held liable to a civil action in damages. *Wellington v. Wilson*, 14 Upper Can. C. P. 304; *Grassick v. City of Toronto*, 39 Upper Can. Q. B. 306; *Russell v. Men of Devon*, 2 T. R. 667. And see opinion of Gray, C. J., in *Hill v. Boston*, *supra*.

<sup>2</sup> *O'Connor v. Pittsburgh*, 18 Pa. St. 187, 189; *Barney v. Keokuk*, 94 U. S.

324; *Perry v. New Orleans, etc., Co.*, 55 Ala. 413; *Matter of Sackett Street*, 74 N. Y. 95. And see *Ante*, Ch. XIX. In Massachusetts it is held that the legislature may apportion between the county and towns benefited by laying out a highway, the damages to be paid for the property taken, and also the cost of maintenance and repairs, and may delegate the authority to do this to commissioners. *Haverhill Bridge v. County Comm'rs*, 103 Mass. 120, *Whitman v. Groveland*, 131 Mass. 553. See, also, *Att'y Gen. v. Cambridge*, 16

Gray. 247.

over streets and has power to raise means for that purpose,<sup>1</sup> and this seems to be the most reasonable ground upon which the liability can be placed. It is held by some courts, however, that no liability for failure to keep streets in repair exists, unless it is expressly so provided by statute.<sup>2</sup> Such is the established law as to towns and even as to cities in the New England States.<sup>3</sup>

Where the duty to repair is expressly cast upon a municipal corporation and it is provided with means to perform such duty,

<sup>1</sup> *Grove v. City of Ft. Wayne*, 45 Ind. 429; *Albritten v. Huntsville*, 60 Ala. 486; *Conrad v. Ithaca*, 16 N. Y. 158; *Weet v. Brockport*, 16 N. Y. 161; *Nelson v. Canisteo*, 100 N. Y. 89, S. C. 2 N. E. Rep. 473; *Saulsbury v. Ithaca*, 94 N. Y. 27, S. C. 46 Am. Rep. 122; *Kellogg v. Janesville*, 34 Minn. 132, S. C. 24 N. W. Rep. 359; *Delger v. City of St. Paul*, 14 Fed. Rep. 567; *Noble v. City of Richmond*, 31 Gratt. 271; *Larson v. Grand Forks*, 3 Dak. 307; *Boulder v. Niles*, 9 Col. 415; *Cooley on Torts*, 625. Absence of funds or means to procure them will excuse neglect to keep in repair. *Hines v. Lockport*, 50 N. Y. 236. But the burden is on the city to show that fact. *Weed v. Ballston Spa.*, 76 N. Y. 329, 335.

<sup>2</sup> *City of Detroit v. Blackeby*, 21 Mich. 84; *Oliver v. Worcester*, 102 Mass. 489, S. C. 3 Am. Rep. 485; *Pray v. Jersey City*, 32 N. J. L. 394; *Winbigler v. Los Angeles*, 45 Cal. 36; *Young v. City Council*, 20 S. Car. 116, S. C. 47 Am. Rep. 827; *Altnow v. Sibley*, 30 Minn. 186, S. C. 44 Am. Rep. 191.

<sup>3</sup> *Hill v. Boston*, 122 Mass. 344, S. C. 23 Am. Rep. 332; *French v. Boston*, 129 Mass. 592; *Burritt v. New Haven*, 42 Conn. 174; *Eastman v. Meredith*, 36 N. H. 284; *Morgan v. Hallowell*, 57 Me. 375, 378; *Jones v. New Haven*, 34 Conn. 1, 13; *Beardsley v. Hartford*, 50 Conn. 529, S. C. 4 Am. & Eng. Corp. Cas. 595; *Hyde v. Jamaica*, 27 Vt. 443.

The cases just cited will serve to show generally what is and what is not actionable negligence under the New England statutes. They generally provide that the streets shall be kept in good and sufficient repair, or safe and convenient, and that the town or city shall be liable to persons injured by reason of any defect or want of repair. In some of them the right to recover is granted only to travelers. A brief synopsis of some of the statutes will be found in 2 Dillon Munic. Corp., section 1000, note 2. As to what constitutes a defect see the opinions in carefully considered cases of *Kingsbury v. Dedham*, 13 Allen, 186, S. C. 90 Am. Dec. 191; *Hewison v. City of New Haven*, 34 Conn. 136, S. C. 91 Am. Dec. 718, 722; *McKellar v. Detroit*, 57 Mich. 158, S. C. 58 Am. Rep. 357. In a very recent case, a hitching post within the limits of a street and upon or so near the carriage way as to render travel in carriages unsafe, was held to be a defect for which the city was liable. *Arey v. City of Newton*, 148 Mass. 598. As to who may recover as *travelers*, see *Hardy v. Keene*, 52 N. H. 370; *Blodgett v. Boston*, 8 Allen, 237; *Britton v. Cummington*, 107 Mass. 347; *Barker v. Worcester*, 139 Mass. 74; *Wilson v. Granby*, 22 Alb. L. Jour. 416, S. C. 47 Conn. 59; *Stinson v. Gardiner*, 42 Me. 248, S. C. 66 Am. Dec. 281.

it is, according to the prevailing doctrine, liable to any one injured without fault on his part, by its neglect to perform such duty, regardless of the want of any statute expressly imposing such liability. And it is conceived that outside of New England, the rule, even where the duty is not specifically enjoined, is that a municipal corporation which is given exclusive control over its streets, together with means to repair and maintain them, is in duty bound to exercise the power granted so far as to make its streets reasonably safe and convenient; and if it fails to do so, it is liable for any injury occasioned by its neglect to perform such duty. This is certainly the rule which has found favor with the great majority of the courts.<sup>1</sup> It is no defence to an action against a city for an injury caused by its neglect to repair a street, that the city has no funds on hand for that purpose and that it has exhausted the regular tax levy, where its charter permits it to levy an additional tax for purposes of general utility.<sup>2</sup> And even in those States in which it is held that municipal corporations are not liable for failure to repair their streets, they are, nevertheless, held liable for posi-

<sup>1</sup> Authorities cited in note 1, *ante*, 445, and see, in addition, *City of Denver v. Dunsmore*, 7 Col. 328, S. C. 4 Am. & Eng. Corp. Cas. 568; *City of Galveston v. Barbour*, 62 Tex. 172, S. C. 8 Am. & Eng. Corp. Cas. 577; *City of Richmond v. Long's Admr.*, 17 Gratt. 375; *Delger v. City of St. Paul*, 14 Fed. Rep. 567; *Munger v. City of Marshalltown*, 13 N. W. Rep. 642; *City of Selma v. Perkins*, 68 Ala. 145; *Austin v. Ritz* (Tex.), 9 S. W. R. 884; *Clark v. City of Richmond*, 83 Va. 355, S. C. 5 Am. St. Rep. 281; *Klein v. Dallas*, 71 Tex. 280; *Welter v. St. Paul* (Minn.), 42 N. W. R. 392; *Hiner v. Fond du Lac*, 71 Wis. 74; *Moore v. Richmond* (Va.), 8 S. E. 387; *Young v. Waterville* (Minn.), 39 N. W. R. 97; *Barnes v. Dist. of Columbia*, 91 U. S. 540, and authorities cited; *Browning v. City of Springfield*, 17 Ill. 143, S. C. 63 Am. Dec. 345, and numerous authorities cited in note on page 352. But negli-

gence is the basis of the right to damages, and where the injury is the result of a pure accident there can be no recovery. *Enright v. Atlanta*, 78 Ga. 288.

<sup>2</sup> *City of Erie v. Schwingle*, 22 Pa. St. 384, S. C. 60 Am. Dec. 87; *Hines v. Lockport*, 50 N. Y. 236; *Albritton v. Huntsville*, 60 Ala. 486; *Delger v. St. Paul*, 14 Fed. R. 567; *Shartle v. Minneapolis*, 17 Minn. 308; *Evanston v. Gunn*, 99 U. S. 660. Nor that it had expended all its funds on the improvement of other streets. *Whitfield v. City of Meridian* (Miss.), 6 So. Rep. 244; *Incorporated Village of Shelby v. Claggett* (Ohio), 22 N. E. R. 407; *Peach v. Utica*, 10 Hun. 477; *Monk v. Utrecht*, 104 N. Y. 552; *Adsit v. Brady*, 4 Hill, 630; *Hover v. Barkhooff*, 44 N. Y. 113. The burden of showing inability because of a want of funds is on the municipality. *Eveleigh v. Hounsfield*, 34 Hun. 140.

tive acts of negligence by reason of which the streets are rendered unsafe.<sup>1</sup>

The duty to keep the roads and streets safe for passage in the ordinary modes is a comprehensive one, and requires the public corporation upon which it is imposed to keep them clear from obstructions,<sup>2</sup> and free from holes or excavations which render their use hazardous to one exercising due care.<sup>3</sup> Nor is the duty fully performed by making safe the surface of the way, for cities are liable for negligently permitting unguarded excavations near the line of the road or street as well as for negligently allowing objects likely to cause injury to be placed upon the way or near the line.<sup>4</sup> So, too, they are liable for negligently suffering awnings or structures to project over sidewalks and thus cause injury to those rightfully using the street.<sup>5</sup> It may be said in a

<sup>1</sup>Hill v. Boston, 122 Mass. 344, S. C. 23 Am. Rep. 332; City of Chicago v. Hesing, 83 Ill. 204, S. C. 25 Am. Rep. 378; City of Baltimore v. Pendleton, 15 Md. 12; 2 Dill. Munic. Corp., section 1024.

<sup>2</sup>City of Michigan City v. Boeckling (Ind.), 23 N. E. R. 518; Goodfellow v. New York, 100 N. Y. 15. Some of the cases hold a very strict doctrine upon the question of what will constitute an actionable obstruction or defect, and carry the rule to an unjust extent as it seems to us. In Glantz v. City of South Bend, 106 Ind. 305, the city was held liable where the inequality between a cement pavement and a brick walk was held to create a liability. And in City of Indianapolis v. Cook, 99 Ind. 10, the city was held guilty of negligence in permitting a water box to extend one and one half inches above the surface of the sidewalk. Some of the cases declare a more liberal rule in favor of the municipality. Schroth v. City of Prescott, 63 Wis. 652; Cook v. Milwaukee, 27 Wis. 191; Hill v. Fond du Lac, 56 Wis. 242; Village of Ponca v. Cranford, 23 Neb. 662, S. C. 8 Am. St. Rep. 144, and note. See,

generally, Young Tp. v. Sutter (Pa.), 18 Atl. R. 610; Chamberlin v. Town, 7 N. Y. S. R., 190; Fitzgerald v. City of Troy, 7 N. Y. S. 103; Mayor v. Sheffield, 4 Wall. 189; Minick v. Troy, 83 N. Y. 514; Ring v. Cohoes, 77 N. Y. 83. Circumstances will determine, as a general rule, in each particular case whether the municipality can be justly charged with negligence. Borough of Sandy Lakeview v. Forker (Pa.), 18 Atl. R. 609.

<sup>3</sup>Chicago v. Robbins, 2 Black. 418; Robbins v. Chicago, 4 Wall. 657; Barnes v. District of Columbia, 91 U. S. 540; Ehr Gott v. Mayor, 96 N. Y. 221; Brusso v. City of Buffalo, 90 N. Y. 679; Walsh v. Mayor, 107 N. Y. 222; Pettingill v. City of Yonkers, 39 Hun. 449, S. C. on appeal, 41 Alb. L. J. 138; O'Neil v. New Orleans, 30 La. Ann. 220; Sherwood v. District of Columbia, 3 Mackey, 276; Cromarty v. City of Boston, 127 Mass. 329.

<sup>4</sup>Fritsch v. Allegheny, 91 Pa. St. 226; North Manheim v. Arnold, 119 Pa. St. 380; Hinckley v. Somerset, 145 Mass. 326.

<sup>5</sup>Rehberg v. New York, 91 N. Y. 137; Hume v. New York, 74 N. Y. 264;

general way, and that is here sufficient, for the subject is considered at length in the subsequent pages of this chapter, that cities and incorporated towns are liable for any wrongful act which makes the use of the way unsafe whether it is done by the corporation itself or by a third person, but it is always to be understood that in no event are they responsible unless their own want of care or skill is a proximate cause of the injury. In the pages which follow we have considered in detail the principal cases in which there is municipal liability, have given illustrative cases and have stated the extent and limits of many of the chief rules which the adjudged cases assert.

As we have heretofore said, and as it seems necessary for the sake of clearness to here repeat, cities are not insurers of the safety of their streets and alleys. They are simply required to keep them in a reasonably safe condition for persons traveling in the usual modes by day and by night, and exercising ordinary care.<sup>1</sup> They are not bound to keep their streets safe for fast and furious driving or racing.<sup>2</sup> Whether they are obliged to keep their streets reasonably safe for runaway horses is a vexed question. It is clear that if a horse of ordinary gentleness merely shies or swerves to one side so that the driver does not in reality lose control over him, and injury is caused, without fault of the driver, by his thus coming in contact with an obstacle or defect in the highway, the municipality will be liable.<sup>3</sup> But where a horse takes fright at some object for which the municipality is not responsible, and gets beyond the control of his driver and runs away and comes in contact with some obstacle or defect in the road or street, it is held by the highest courts of Maine, Massachusetts, Missouri and Wisconsin, that the municipi-

*Bohen v. Waseca*, 32 Minn. 176, *Lanigan v. Atchison*, 35 Kan. 318.

<sup>1</sup> *City of Indianapolis v. Cook*, 99 Ind. 10, 15; *Ring v. Cohoes*, 77 N. Y. 83, S. C. 33 Am. Rep. 574; *Raymond v. Lowell*, 6 Cush. 524; *Macomber v. City of Taunton*, 100 Mass. 255; *Blake v. St. Louis*, 40 Mo. 566, 571; *Furnell v. St. Paul*, 20 Minn. 117; *City of Aurora v. Pulfer*, 56 Ill. 270; *City of Emporia v. Schmidling*, 7 Am. & Eng. Corp. Cas.

86; *Massey v. Columbus*, 75 Ga. 658; *McCarthy v. Syracuse*, 46 N. Y. 194; *Hunt v. Mayor*, 109 N. Y. 134; *Turner v. Newburgh*, 109 N. Y. 301.

<sup>2</sup> *McCarthy v. Portland*, 67 Me. 167.

<sup>3</sup> *Aldrich v. Gorham*, 77 Me. 287; *Baltimore, etc., Co. v. Bateman*, 68 Md. 389, S. C. 6 Am. St. Rep. 449; *Stone v. Hubbardston*, 100 Mass. 49; *Cushing v. Bedford*, 125 Mass. 526.

pality will not be liable.<sup>1</sup> These cases are based upon the theory that the conduct of the horse is the primary cause of the accident; that there are two efficient independent proximate causes, the primary cause being one for which the corporation is not responsible, and as to which the traveler himself is not in fault, and the other being the defect in the highway; that such being the case, it is impossible to say that the accident would have happened but for the primary cause, and the city can not, therefore, be held liable. According to the weight of authority, however, the city is liable in such a case, where it has been negligent in not removing the obstruction or repairing the defect, provided the injury would not have been sustained but for such obstruction or defect.<sup>2</sup>

Where a horse of ordinary gentleness becomes frightened at objects naturally calculated to frighten horses, which the corporation has negligently placed, or permitted to be placed and remain in the highway, and injury results, without contributory negligence, the corporation will, as a rule, be liable therefor.<sup>3</sup> This liability extends to objects on the margin of the highway and within its limits, although they may not be within the trav-

<sup>1</sup> *Moulton v. Sanford*, 51 Me. 127; *Perkins v. Fayette*, 68 Me. 152; *D. vis v. Dudley*, 4 Allen, 557; *Titus v. North-Bridge*, 97 Mass. 258, S. C. 93 Am. Dec. 91; *Brown v. Mayor*, 57 Mo. 156; *Dreher v. Fitchburg*, 22 Wis. 675; *Houfe v. Fulton*, 29 Wis. 296. Compare *Olson v. Chippewa Falls*, 71 Wis. 558.

<sup>2</sup> *Ring v. Cohoes*, 77 N. Y. 83; *Campbell v. City of Stillwater*, 32 Minn. 308, S. C. 50 Am. Rep. 567, and note; *Hunt v. Pownal*, 9 Vt. 411; *Winship v. Enfield*, 42 N. H. 197; *Hey v. Philadelphia*, 81 Pa. St. 44, S. C. 22 Am. Rep. 733; *City of Crawfordsville v. Smith*, 79 Ind. 308; *City of Rockford v. Russell*, 9 Ill. App. 229; *Sherwood v. Hamilton*, 37 Upper Can. (Q. B.) 410; *Hull v. Kansas City*, 54 Mo. 601; *Ward v. North Haven*, 43 Conn. 148; *Plymouth Tp. v. Graver*, 125 Pa. St. 24, S. C. 17 Atl. R. 249.

<sup>3</sup> *City of Chicago v. Hoy*, 75 Ill. 530; *Rushville v. Adams*, 107 Ind. 475, S. C. 57 Am. Rep. 124; *Morse v. Richmond*, 41 Vt. 435, S. C. 8 Am. L. Reg. (N. S.) 81; *Bartlett v. Hooksett*, 48 N. H. 18; *Foshay v. Glen Haven*, 25 Wis. 288, S. C. 3 Am. Rep. 73; *Stanley v. Davenport*, 54 Ia. 463; *Tp. of North Manheim v. Arnold*, 119 Pa. St. 380, S. C. 13 Atl. R. 444; *Ayer v. Norwich*, 39 Conn. 376; *Card v. Ellsworth*, 65 Me. 547, S. C. 20 Am. R. 722; *Bennett v. Fifield*, 13 R. I. 139, S. C. 43 Am. R. 17. *Contra*, in Massachusetts, *Keith v. Easton*, 2 Allen, 552; *Kingsburg v. Dedham*, 13 Allen, 186; *Cook v. Charlestown*, 98 Mass. 80. See, also, *Agnew v. Corunna*, 55 Mich. 428, S. C. 54 Am. R. 383; *Hughes v. Fond du Lac*, 73 Wis. 380, S. C. 41 N. W. R. 407.

eled path.<sup>1</sup> The object must be of such a character, however, that it is naturally calculated to frighten horses.<sup>2</sup> Thus, where a hole in the highway was filled up with stones so as to be safe for a horse and carriage to pass over, it was held that the fact that a horse was frightened at its appearance did not render the town liable for an injury happening on that account.<sup>3</sup> So, where a horse took fright at a tree on a wagon standing temporarily on the road in charge of a driver, it was held that the town was not liable.<sup>4</sup> And, in a recent case, where a land owner, who had been engaged in whitewashing his fence, left a small barrel mounted on wheels, with a stick projecting slightly above the barrel, at the side of the highway over Sunday, it was held that the defendant was not liable for injuries resulting from the fright of the horse unless the object was of so unusual a character as to have a natural tendency to frighten horses of ordinary gentleness and training, and was left by the roadside an unreasonable length of time.<sup>5</sup> On the other hand, cities have been held liable for injuries caused by horses taking fright at steam-rollers,<sup>6</sup> dead horses,<sup>7</sup> and boulders<sup>8</sup> in the way. Whether the object is, in its nature, calculated to frighten horses of ordinary gentleness is usually, however, a question for the jury to determine from a consideration of its character, situation, the amount of travel on the highway, and other like cir-

<sup>1</sup> *Morse v. Richmond*, 41 Vt. 435, S. C. 98 Am. Dec. 600; *Foshay v. Glen Haven*, 25 Wis. 288; *Town of Rushville v. Adams*, 107 Ind. 475, S. C. 57 Am. Rep. 124. But "there is no doubt that a town would be liable in damages in many cases where horses become frightened by objects within the traveled way, when the same objects could not reasonably be regarded as constituting a defective road if situated outside the traveled way." *Nichols v. Athens*, 66 Me. 402, 404.

<sup>2</sup> *Ayer v. Norwich*, 39 Conn. 376, S. C. 12 Am. R. 396; *Piollet v. Simmers*, 106 Pa. St. 95; *Mallory v. Griffey*, 86 Pa. St. 275, S. C. 2 Thomp. Neg. 778.

<sup>3</sup> *Merrill v. Hampden*, 26 Me. 234.

<sup>4</sup> *Davis v. Bangor*, 42 Me. 522. See,

also, *Rounds v. Stratford*, 26 Upper Can. C. P. 11.

<sup>5</sup> *Piollet v. Simmers*, 106 Pa. St. 95, S. C. 51 Am. Rep. 496. See, also, *Rounds v. Stratford*, 26 Upper Can. C. P. 11.

<sup>6</sup> *Stanley v. Davenport*, 54 Ia. 463, S. C. 37 Am. Rep. 216; *Young v. New Haven*, 39 Conn. 435; *Watkins v. Reddin*, 2 F. & F. 629. *Contra*, *Sparr v. St. Louis*, 4 Mo. App. 572; *Macomber v. Nichols*, 34 Mich. 212, S. C. 22 Am. Rep. 522.

<sup>7</sup> *Chicago v. Hoy*, 75 Ill. 530; *Morse v. Richmond*, 98 Am. Dec. 600, 606.

<sup>8</sup> *Card v. Ellsworth*, 65 Me. 547, S. C. 20 Am. Rep. 722. *Contra*, *Agnew v. Corunna*, 55 Mich. 428, S. C. 54 Am. Rep. 383.

cumstances.<sup>1</sup> In New Hampshire and Maine it has been held that evidence of other horses having been frightened at the same object is admissible to show its natural tendency to frighten horses,<sup>2</sup> but such evidence has been held inadmissible in Wisconsin and Indiana.<sup>3</sup>

It is a general rule that "where two causes combine to produce an injury to a traveler upon a highway, both of which are in their nature proximate—the one being a culpable defect in a highway, and the other some occurrence for which neither party is responsible—the municipality is liable, provided the injury would not have been sustained but for such defect."<sup>4</sup> This rule has been applied in many cases, and in some of them cities have been held liable under very peculiar circumstances. Thus, where the plaintiff stepped into a hole in the sidewalk and was thrown on a railway track, and, in attempting to get up, caught his clothes on a spike in the sidewalk, which held him until he was struck by a passing train, the city was held liable.<sup>5</sup> So, where a traveler's horse was frightened by a defect

<sup>1</sup> 2 Thomp. Neg. 778; *Lawrence v. Mt. Vernon*, 35 Me. 100; *Winship v. Enfield*, 42 N. H. 197; *Chamberlain v. Enfield*, 43 N. H. 356; *Ayer v. Norwich*, 39 Conn. 376, S. C. 12 Am. Rep. 396; *Fritsch v. Allegheny*, 91 Pa. St. 226, *Cleveland, etc., Ry. Co. v. Wyant*, 114 Ind. 525, S. C. 5 Am. St. Rep. 644.

<sup>2</sup> *Darling v. Westmoreland*, 52 N. H. 401, S. C. 13 Am. Rep. 55; *Crocker v. McGregor*, 76 Me. 282, S. C. 49 Am. Rep. 611. Compare *Lewis v. Eastern R. R.*, 60 N. H. 187.

<sup>3</sup> *Bloor v. Delafield*, 69 Wis. 273, S. C. 18 Am. & Eng. Corp. Cas. 289; *Cleveland, etc., R. R. Co. v. Wyant*, 114 Ind. 525, S. C. 5 Am. St. Rep. 644. But the Wisconsin and Indiana cases can not be taken as expressive of a universal rule, for they ought not to be regarded as going further than that there are some objects which may be declared as matter of law not likely to frighten well-broken horses.

<sup>4</sup> 2 Shearm. & Red. on Neg. (4th ed.), section 346; *Ring v. Cohoes*, 77 N. Y. 83; *Ehrgott v. New York*, 96 N. Y. 264; *Hunt v. Pownal*, 9 Vt. 411; *Palmer v. Andover*, 56 Mass. 600; *Houfe v. Fulton*, 29 Wis. 296; *McNamara v. Clintonville*, 62 Wis. 207. It is, indeed, a rule of wide sweep that the concurring negligence of a third person will not shield the wrong-doer. Perhaps its strongest application is found in the case of an action by a servant against the common master. *Cincinnati, etc., Co. v. Lang*, 118 Ind. 579; *Franklin v. Winona, etc., Co.*, 37 Minn. 409, S. C. 5 Am. St. R. 856; *Farren v. Sellers*, 39 La. Ann. 1011, S. C. 4 Am. St. R. 256; *Cayzer v. Taylor*, 10 Gray, 274, S. C. 69 Am. Dec. 317.

<sup>5</sup> *City of Chicago v. Schmidt*, 107 Ill. 186. In another case, a child fell into an excavation negligently left in a public sidewalk and was hurt by broken glass at the bottom of the excavation, and it was held that the defect in the



in the way, and, breaking loose, ran into another traveler, it was held that the injury to the latter was the natural and proximate consequence of the defect, for which the town was liable.<sup>1</sup> In another case the plaintiff was driving down hill on a road by the side of a precipice; his horses ran away through an opening in the railing and went down the precipice. It was held that the mere fact of his horses running away would not prevent a recovery unless he was guilty of a want of reasonable care or skill, which was a question for the jury to determine.<sup>2</sup> So, where the plaintiff, in trying to free his horse from a defect in the road, was struck by the horse's head and injured, the defect in the way was held the proximate cause of the injury.<sup>3</sup> These illustrations might be multiplied, but enough have been given to show the current of judicial opinion.<sup>4</sup> If the injury is caused both by a defect in the highway and a defect in the plaintiff's horse, carriage, or harness, for which the plaintiff is in fault, a different rule applies, and he can not recover,<sup>5</sup> although he might do so if not in fault himself.<sup>6</sup>

Fences or barriers are not ordinarily required along a highway to prevent travelers from straying out of its limits;<sup>7</sup> but if there are excavations or other dangerous defects or obstructions close to the way, the city or local authorities, as the case may be, should erect barriers or take other proper precautions to

sidewalk was the proximate cause of the injury. *City of Galveston v. Posnainsky*, 62 Texas, 118, S. C. 50 Am. Rep. 517.

<sup>1</sup> *Merrill v. Clermont*, 58 N. H. 468. To same effect, *Fulsome v. Concord*, 46 Vt. 135; *Centerville v. Woods*, 57 Ind. 192, 197. In *Baldwin v. Greenwood Turnpike Co.*, 40 Conn. 238, this rule was applied, although the injury occurred on another road to which the horse had escaped.

<sup>2</sup> *Sherwood v. Corp. of Hamilton*, 37 Upper Can. Q. B. 410, following the New Hampshire rule.

<sup>3</sup> *Page v. Bucksport*, 64 Me. 51.

<sup>4</sup> For other illustrative cases, consult, *Willey v. Belfast*, 61 Me. 569; *Lund v.*

*Tyngsborough*, 11 Cush. 563; *Brooksville v. Pumphrey*, 59 Ind. 78; *City of Galveston v. Posnainsky*, 62 Tex. 118; *City of Atlanta v. Wilson*, 59 Ga. 544. <sup>5</sup> *Fogg v. Nahant*, 106 Mass. 278; *Jenks v. Wilbraham*, 11 Gray, 142; *Jackson v. Bellevue*, 30 Wis. 250; *Tucker v. Henniker*, 41 N. H. 317.

<sup>6</sup> *Hunt v. Pownal*, 9 Vt. 411; *Hull v. Kansas City*, 54 Mo. 598. *Contra*, *Moore v. Abbot*, 32 Me. 46.

<sup>7</sup> *Sparhawk v. Salem*, 1 Allen, 30, S. C. 75 Am. Dec. 700; *Dailey v. Worcester*, 131 Mass. 452; *Chapman v. Cook*, 10 R. I. 304; *Keyes v. Marcellus*, 50 Mich. 439; *Clark v. Richmond*, 83 Va. 355, S. C. 5 Am. St. Rep. 281.

warn travelers of the danger.<sup>1</sup> It may, indeed, be stated as a general rule that wherever railings or barriers are necessary for the safety of travelers it is negligence not to construct and maintain them.<sup>2</sup> In a recent case, a city was held liable where, in constructing a bridge, it made an excavation in the bed of a shallow stream where it was crossed by a street, and constructed a levee from the bank to the excavation, and, knowing that children of persons living near by were accustomed to play in that vicinity, left it without safeguards, by reason of which a child five years old, while at play, without any fault of its parents, fell into the pit and was drowned.<sup>3</sup> There is some conflict among the decided cases as to when and under what circumstances, if at all, cities are bound to erect railings or other safeguards around or about basement areas. If the area or opening extends into the sidewalk, and is of such a character as to be palpably dangerous to travelers, it would clearly be the duty of the city to erect necessary barriers or to compel the owner either to remove it entirely or make it safe. If, however, the area or entrance way is entirely without the limits of the street, upon private property, but contiguous to the sidewalk, the duty of the city is not so clear. Thus, in a recent case, it is held that, as areas and basement descents are necessary, in order to properly carry on business in a city, and, as the city can not go upon private property to erect barriers, no duty rests upon it to maintain railings in front of such places, and it is not neg-

<sup>1</sup> *Woods v. Groton*, 111 Mass. 357; *Norris v. Litchfield*, 35 N. H. 271. *Halpin v. Kansas City*, 76 Mo. 335; *Whether a highway should be guarded* at a particular place or not is generally a question of fact for the jury. *Burrell v. Verley*, 35 Ill. 58, S. C. 85 Am. Dec. 342; *City of Delphi v. Lowery*, 74 Ind. 520, and cases there cited.

<sup>2</sup> *Orme v. Richmond*, 79 Va. 86; *Niblett v. Nashville*, 12 Heisk. 684; *Toms v. Corp. of Whitley*, 35 Upper Can. Q. B. 195, S. C. 37 Q. B. 100; *Pittston v. Hart*, 89 Pa. St. 389; *Plymouth Tp. v. Graver*, 125 Pa. St. 24, S. C. 17 Atl. R. 249; *Olson v. Chippewa Falls*, 71 Wis. 558, S. C. 37 N. W. 57; *Scott v. Montgomery*, 95 Pa. St. 444; *City of Indianapolis v. Emmelman*, 108 Ind. 530. See, also, *City of Chicago v. Hesing*, 83 Ill. 204; *Niblett v. Nashville*, 12 Heisk. (Tenn.) 684; *Graves v. Thomas*, 95 Ind. 361, S. C. 48 Am. Rep. 727; *Beck v. Carter*, 68 N. Y. 283; *McAlpin v. Powell*, 70 N. Y. 126; *Osage City v. Larkin*, 40 Kan. 206.

ligent for failing so to do.<sup>1</sup> Some of the other courts take a similar view of the duty and liability of cities in such cases,<sup>2</sup> but we think that if the opening is notoriously and evidently dangerous to pedestrians, it is the duty of the city either to provide proper safeguards or to compel the owner to do so, no matter whether the area extends into the sidewalk or is merely contiguous thereto.<sup>3</sup> This is recognized as the correct rule by the Supreme Court of Wisconsin, but the erection of a sufficient railing along the side of a stairway, which descended parallel with the sidewalk, was held a compliance with the rule, although no gate or barrier was maintained at the entrance.<sup>4</sup>

Cities must keep their streets reasonably safe from falling substances,<sup>5</sup> as well as from defects in the road-bed. Thus they have been held liable for injuries from rotten wooden awnings and signs upon or above the sidewalk;<sup>6</sup> also for injuries caused by limbs falling from dead trees standing in the way,<sup>7</sup> and even for allowing a banner to remain for a considerable time suspended across a street.<sup>8</sup> So, a city was held liable for an injury inflicted by the fall of a flag pole erected in an untraveled part of one of its streets by a private citizen years before, although it had no actual knowledge that the pole was insecure and dangerous, the court holding that it was the duty of the city authorities to take notice of the tendency of timber to

<sup>1</sup> *Beardsley v. Hartford*, 50 Conn. 529, 725; *Merrill v. Portland*, 4 Cliff. C. Ct. S. C. 47 Am. Rep. 677, S. C. 4 Am. & 438.  
Eng. Corp. Cas. 595.

<sup>2</sup> *Witham v. Portland*, 72 Me. 539; *Temperance Hall Ass'n v. Giles*, 33 N. J. L. 260.

<sup>3</sup> *Niblett v. Nashville*, 12 Heisk. (Tenn.) 684, S. C. 27 Am. Rep. 755; *City Council of Augusta v. Hafers*, 59 Ga. 151; *Rowell v. Williams*, 29 Ia. 210; *Grove v. Kansas City*, 75 Mo. 672.

<sup>4</sup> *Fitzgerald v. Berlin*, 51 Wis. 81, S. C. 37 Am. Rep. 814.

<sup>5</sup> *Grove v. Ft. Wayne*, 45 Ind. 429; *Day v. Milford*, 5 Allen, 98; *Hardy v. Keene*, 52 N. H. 370; *Hume v. Mayor*, 74 N. Y. 264; *Parker v. Macon*, 39 Ga.

*Bohen v. Waseca*, 32 Minn. 176, S. C. 50 Am. Rep. 564; *Duffy v. Dubuque*, 63 Ia. 171; *Drake v. Lowell*, 13 Metc. 292; *West v. Lynn*, 110 Mass. 514; *Langan v. Atchison*, 35 Kan. 318. *Contra*, *Hewison v. New Haven*, 34 Conn. 136; *Taylor v. Peckham*, 8 R. I. 349.  
<sup>7</sup> *Jones v. New Haven*, 34 Conn. 1; *Gilchrist v. Carden*, 26 Upper Can. C. P. 1.

<sup>8</sup> *Champlin v. Penn Yan*, 34 Hun. 33. See, also, *French v. Brunswick*, 21 Me. 29. *Contra*, *Hewison v. New Haven*, 37 Conn. 475.

decay.<sup>1</sup> And it is not absolutely essential to the liability of the city that the structure should be directly above the street, for it may also be liable for substances which fall from adjoining buildings upon travelers properly using the street.<sup>2</sup> On the other hand, where a heavy iron weight attached to a banner suspended across a street by a private citizen fell upon a traveler, the city was held free from liability;<sup>3</sup> and a similar ruling was made where a sign fastened to an iron rod fell and injured the plaintiff.<sup>4</sup> These cases, however, depended upon the peculiar statutes in force in most of the New England States, making cities liable only for "defects" in their streets.

When a road or street is opened and public travel is invited thereon, it must be made reasonably safe for such travel. Whether this rule requires that the entire width of the highway should be kept in repair and free from defects is a question on which there are conflicting decisions. The general rule appears to be that the duty to keep in repair extends only to the "traveled path" or portion of the way in actual use, provided it is wide enough to be safe.<sup>5</sup> Necessity and expediency, without anything more, would probably justify such a rule in the case of country roads; but it would seem, on principle, that where a city has once improved a street and leaves it open to the public throughout its entire width, the whole of it must be kept in repair.<sup>6</sup> Some of the courts have drawn a distinction

<sup>1</sup> *Norristown v. Moyer*, 67 Pa. St. 355; *Gilmartin v. Mayor*, 55 Barb. 239. But the duty to keep streets safe from falling substances does not require a municipal corporation to protect a house standing near the dangerous walls of a burnt building from injury from such walls. *City of Anderson v. East*, 117 Ind. 126, S. C. 10 Am. S. Rep. 35.

<sup>2</sup> *Langan v. Atchison*, 35 Kan. 318, S. C. 57 Am. Rep. 165; *Duffy v. City of Dubuque*, 63 Ia. 171, S. C. 50 Am. Rep. 743; *Kiley v. City of Kansas*, 69 Mo. 102, S. C. 33 Am. Rep. 491.

<sup>3</sup> *Hewison v. New Haven*, 34 Conn. 136. Compare *Cain v. Syracuse*, 95 N. Y. 83.

<sup>4</sup> *Jones v. Boston*, 104 Mass. 75. See, also, *Hewison v. New Haven*, 37 Conn. 475.

<sup>5</sup> *Tritz v. Kansas City*, 84 Mo. 632; *Brown v. Glasgow*, 57 Mo. 157; *Sykes v. Pawlet*, 43 Vt. 446; *Perkins v. Inhabitants*, 68 Me. 152, S. C. 28 Am. R. 84; *Fitzgerald v. Berlin*, 64 Wis. 203; *Rice v. Montpelier*, 19 Vt. 470; *Packard v. Packard*, 16 Pick. 191; *Tisdale v. Norton*, 8 Metc. 388; *Campbell v. Race*, 7 Cush. 408; *Ireland v. Oswego, etc., Co.*, 13 N. Y. 526, 531.

<sup>6</sup> *Montgomery v. Wright*, 72 Ala. 411, S. C. 5 Am. & Eng. Corp. Cas. 642; *City of Chicago v. Robbins*, 2 Black. 418; *Bacon v. Boston*, 3 Cush. 174;

between highways situated in different parts of the same city, holding the city bound to keep in repair the entire width of those in the closely built up portions of the city, and only a part of the width of those in the suburbs, where it is sparsely settled.<sup>1</sup> It may well be doubted if any such distinction exists as matter of law,<sup>2</sup> although it is undoubtedly true that cities have a wide discretion in determining how much of a highway shall be devoted to the use of horses and vehicles, and how much shall be given to the sidewalk, trees, gutters, and the like.<sup>3</sup> They are not required to maintain bridges or crossings over gutters or ditches made for draining the streets, at other places than the regular public crossings or street intersections, and where the owner of property abutting on a street was injured by falling off of a plank which he had placed across such a ditch for his own convenience in going and coming to or from his premises, he was held not entitled to recover from the corporation, as it was under no duty to maintain a proper crossing from his house to the street.<sup>4</sup>

The responsibility of the authorities for the condition of a highway begins when they have actually opened it for public travel, although the time allowed by statute for its construction

Stafford. *v.* Oskaloosa, 64 Ia. 251; Indianapolis *v.* Gaston, 58 Ind. 224; Biggs *v.* Huntington (W. Va.), 9 S. E. R. 51.

<sup>1</sup> Monongahela *v.* Fischer, 111 Pa. St. 9, S. C. 56 Am. Rep. 241; Keyes *v.* Marcellus, 50 Mich. 439, S. C. 45 Am. Rep. 52; Wellington *v.* Gregson, 31 Kan. 99, S. C. 6 Am. & Eng. Corp. Cas. 215; Whitfield *v.* City of Meridian (Miss.), 6 So. Rep. 244; See Fulliam *v.* Muscatine, 70 Ia. 436; O'Connor *v.* Tp. of Otonabee, 35 Upper Can., Q. B. 73. In this last case will be found some very sensible remarks concerning township roads.

<sup>2</sup> Whether a highway is wide enough to be safe is generally a question for the jury to determine. Craig *v.* Sedalia, 63 Mo. 417; Johnson *v.* Whitefield, 18

Me. 286; Savage *v.* Bangor, 40 Me. 176; Aldrich *v.* Pelham, 1 Gray, 510.

<sup>3</sup> McArthur *v.* Saginaw, 58 Mich. 357, S. C. 55 Am. Rep. 687, and authorities cited on page 688; Bassett *v.* St. Joseph, 53 Mo. 290, S. C. 14 Am. Rep. 446; City of Wellington *v.* Gregson, 31 Kan. 99, S. C. 6 Am. & Eng. Corp. Cas. 215, S. C. 47 Am. Rep. 482.

<sup>4</sup> McCarthy *v.* Corp. of Oshawa, 19 Upper Can. Q. B. 245. See, also, Williams *v.* Grand Rapids, 59 Mich. 51, S. C. 14 Am. & Eng. Corp. Cas. 464. A covered drain is not a culvert within the meaning of a statute requiring public corporations to keep "bridges, crosswalks and culverts in repair." Kowalka *v.* St. Joseph (Mich.), 41 N. W. R. 416; See Fletcher *v.* Scotten (Mich), 41 N. W. R. 901, as to the liability for a plank walk built by a land owner.

may not have expired;<sup>1</sup> and where it is not opened for public use, and the public are properly notified of that fact by barriers, or other means, there is no liability on the part of the corporation to a traveler injured on the road, even if the time for its completion has expired.<sup>2</sup> Whenever the authorities throw a highway open for travel, or invite and induce travel thereon by any other means, the duty to keep it in repair arises, and they will be liable, in a proper case, for failing to perform that duty.<sup>3</sup> This is also true, as a rule, where a city tacitly permits a thoroughfare to be used as a public street, although it was not originally laid out or established under city authority.<sup>4</sup> The fact that the city may require the property owners to repair, and that an ordinance has been passed to that effect, is no defence;<sup>5</sup> nor will it be relieved from liability, where it has sufficient notice either actual or constructive, merely because the sidewalk or crossing where a defect exists was constructed by a private individual.<sup>6</sup>

Where a city is required by statute, or by its charter, to light its streets, it is, of course, liable for injuries caused by its neglect to do so;<sup>7</sup> but where no such duty is imposed on it by the

<sup>1</sup> *Blaisdell v. Portland*, 39 Me. 113; *Bradbury v. Benton*, 69 Me. 194, *South-erland v. Jackson*, 30 Me. 462; *Hutson v. New York*, 5 Sandf. 289, 302. Compare *Lowell v. Moscow*, 12 Me. 300.

<sup>2</sup> See *Drury v. Worcester*, 21 Pick. 44; *Lowell v. Moscow*, 12 Me. 300; *King v. Cumberworth*, 3 Barn. & Ad. 108; *Cartwright v. Belmont*, 58 Wis. 370. Posting a legible and conspicuous notice may be sufficient. *Smith v. Lowell*, 139 Mass. 336.

<sup>3</sup> *Triese v. St. Paul (Minn.)*, 18 Am. & Eng. Corp. Cas. 301; *Aurora v. Colshire*, 55 Ind. 484; *Sewell v. City of Cohoes*, 75 N. Y. 45. And see *Coates v. Canaan*, 51 Vt. 131; *Harpe v. Milwaukee*, 30 Wis. 365; *Stark v. Lancaster*, 57 N. H. 88; *Phelps v. Man-kato*, 23 Minn. 276; *Manderschid v. Dubuque*, 25 Ia. 108; *Mansfield v. Moore*, 124 Ill. 133.

<sup>4</sup> *Gallagher v. St. Paul*, 28 Fed. Rep. 305; *Saulsbury v. Ithaca*, 94 N. Y. 27, S. C. 4 Am. & Eng. Corp. Cas. 591; *Requa v. Rochester*, 45 N. Y. 129, S. C. 6 Am. R. 52; *Mansfield v. Moore*, 21 Ill. App. 326; *Barton v. Montpelier*, 30 Vt. 650; *Steubenville v. King*, 23 Ohio St. 610. Compare *Bishop v. Cen-tralia*, 49 Wis. 669; *Kelley v. Columbus*, 41 Ohio St. 263.

<sup>5</sup> *Russell v. Canastota*, 98 N. Y. 496; *Rockford v. Hildebrand*, 61 Ill. 155; *Philadelphia v. Smith (Pa.)*, 16 Atl. R. 493.

<sup>6</sup> *Aurora v. Bitner*, 100 Ind. 396; *Hill v. Fond du Lac*, 56 Wis. 242; *Vil-lage of Ponca v. Crawford*, 23 Neb. 662, S. C. 8 Am. St. Rep. 144.

<sup>7</sup> *Butler v. Bangor*, 67 Me. 385; *Gas-kins v. Atlanta*, 73 Ga. 746; *Noble v. Richmond*, 31 Gratt. 271; *Barnes v. District of Columbia*, 91 U. S. 540.

legislature, it is not liable for omitting to light its streets,<sup>1</sup> although the fact that a street was or was not lighted may be material upon the question of negligence where it was partially obstructed or out of repair.<sup>2</sup>

While a highway is undergoing repair, ordinary care must be taken to prevent injuries to travelers thereon.<sup>3</sup> If the way becomes dangerous or impassable it must be protected, and fences, barriers, or other means, must be used to warn travelers of the danger.<sup>4</sup> The obligation to keep the way in repair does not cease until it is lawfully discontinued,<sup>5</sup> or comes within the control of some other corporation or person whose sole duty it is to repair.<sup>6</sup> The general doctrine is, that a municipal corporation can not evade the duty to use reasonable care in keeping its streets in a safe condition for travel by any act of its own.<sup>7</sup> There remains always the general supervisory duty, which can not be culpably neglected without liability; this much is plain, but there is some difficulty when the question in the particular case, as, for instance, where there is an independent contractor, is as to the extent and limits of the duty.

When a municipal corporation has permitted snow and ice to accumulate and remain upon its sidewalks for an unreasonable time in a rounded, uneven and dangerous condition, and an in-

<sup>1</sup> *Randall v. Eastern R. R. Co.*, 106 Mass. 276, S. C. 8 Am. Rep. 327; *Macomber v. Taunton*, 100 Mass. 255; *City of Freeport v. Isbell*, 83 Ill. 440, S. C. 25 Am. R. 407.

<sup>2</sup> *City of Indianapolis v. Scott*, 72 Ind. 196; *Lyon v. Cambridge*, 136 Mass. 419; *Miller v. St. Paul*, 38 Minn. 134, S. C. 20 Am. & Eng. Corp. Cas. 349; *City of Freeport v. Isbell*, 83 Ill. 440; *Lewis v. Atlanta*, 77 Ga. 756, S. C. 4 Am. St. R. 108.

<sup>3</sup> *Southwell v. Detroit* (Mich.), 42 N. W. R. 118; *Kimball v. Bath*, 38 Me. 219, S. C. 61 Am. Dec. 243; *City of Buffalo v. Holloway*, 7 N. Y. 493, S. C. 57 Am. Dec. 550, and note 553; *Kelsey v. Glover*, 15 Vt. 708; *Lloyd v. Mayor*, 5 N. Y. 369. *Contra*, *James v. San*

*Francisco*, 6 Cal. 528, S. C. 65 Am. Dec. 528.

<sup>4</sup> *Prideaux v. Mineral Point*, 43 Wis. 513; *Clifford v. Dam*, 81 N. Y. 52; *City of Buffalo v. Holloway*, 7 N. Y. 493; *City of Chicago v. Johnson*, 53 Ill. 91; *Covington v. Bryant*, 7 Bush. (Ky.) 248; *Bunch v. Edenton*, 90 N. C. 431; *Southwell v. Detroit*, 42 N. W. R. 118.

<sup>5</sup> *Tinker v. Russell*, 14 Pick. 279.

<sup>6</sup> *Davis v. Lamoille Plank Road Co.*, 27 Vt. 602. A town can not escape liability by turning over the control of the way to other local authorities. *Mechanicsburg v. Meredith*, 54 Ill. 84. See, also, *Barber v. Essex*, 27 Vt. 62; *People v. Brooklyn*, 65 N. Y. 349.

<sup>7</sup> *Jefferson v. Chapman*, 127 Ill. 438, S. C. 20 N. E. R. 33; *Birmingham v. McCary*, 84 Ala. 469, S. C. 4 S. R. 630.

jury occurs by reason thereof to one who is properly using the walk and exercising ordinary and reasonable care, the municipality will be liable to him in damages.<sup>1</sup> Where, however, there is no fault in the construction of the way, and the ice or snow has formed with a smooth and even surface, the municipality will not be liable for an accident merely because the ice or snow was slippery;<sup>2</sup> nor will it, ordinarily, be liable in any case until sufficient time has elapsed to clear away the ice or snow.<sup>3</sup> Its liability is based on negligence, and whether it has been negligent or has exercised due care must depend upon the circumstances of each case, such as the amount of snow fall, the condition of the weather, the form of the snow or ice, and the length of time it has been suffered to remain upon the sidewalk.<sup>4</sup>

Where there is a defect in the construction of the sidewalk, and an injury has been occasioned partly by such defect and partly by the slippery condition of the walk, caused by snow

<sup>1</sup> *Collins v. Council Bluffs*, 32 Ia. 324; *Todd v. Troy*, 61 N. Y. 506; *McLaughlin v. Corry*, 77 Pa. St. 109; *Luther v. Worcester*, 97 Mass. 268; *Morse v. Boston*, 109 Mass. 446; *Cook v. Milwaukee*, 24 Wis. 270; *Barton v. Montpelier*, 30 Vt. 650; *Savage v. Bangor*, 40 Me. 176.

<sup>2</sup> *Stone v. Hubbardston*, 100 Mass. 50; *Stanton v. Springfield*, 12 Allen, 566; *Smyth v. Bangor*, 72 Me. 249; *Evans v. Utica*, 69 N. Y. 166; *Kinney v. Troy*, 108 N. Y. 567; *City of Chicago v. McGiven*, 78 Ill. 347; *Ward v. Jefferson*, 24 Wis. 342; *Mauch Chunk v. Kline*, 100 Pa. St. 119; *Broburg v. Des Moines*, 63 Ia. 523, S. C. 4 Am. & Eng. Corp. Cas. 627; *Ringland v. Corp. of Toronto*, 23 Upper Can. C. P. 93; *Bleakley v. Corp. of Prescott*, 12 Ont. App. Rep. 637. Compare *Cloughessey v. Waterbury*, 51 Conn. 405; *Tripp v. Lyman*, 37 Me. 250; *City of Chicago v. Hislop*, 61 Ill. 86. See *Hanson v. Warren (Pa.)*, 14 Atl. R. 405.

<sup>3</sup> *Hayes v. Cambridge*, 136 Mass. 402, S. C. 6 Am. & Eng. Corp. Cas. 18; *Blakeley v. Troy*, 18 Hun. 167. A city is liable in such cases only for its own negligence; it can not, until its negligence is proximately connected with the injury, be held responsible. *Cunningham v. St. Louis*, 96 Mo. 53, S. C. 8 S. W. R. 787. In *Savage v. Bangor*, 40 Me. 176, it is held that if the snow fall is so heavy that the whole street can not be cleared, the municipality must, at any rate, clear and keep safe a passage way.

<sup>4</sup> See *Taylor v. Yonkers*, 105 N. Y. 202, S. C. 11 N. E. R. 642; *Hayes v. Cambridge*, 136 Mass. 402; *Congdon v. Norwich*, 37 Conn. 414; *Burr v. Plymouth*, 48 Conn. 460. In *Rooney v. Randolph*, 128 Mass. 580, it was held proper to take into consideration the expense of clearing the streets after a snow storm, compared with the resources of the town to meet the cost thereof by taxation.



and ice, the city may be liable,<sup>1</sup> although this does not always follow, as a matter of course, from the mere fact that there is an original defect in the sidewalk and that snow has fallen or ice formed upon it. Thus, in a recent case, where it appeared that the sidewalk on which the accident happened had a slope of one inch to the foot and that snow and ice had formed upon it, making it very slippery, it was held that the plaintiff could not recover in the absence of other evidence showing that the slope was a concurrent cause without which the accident would not have occurred.<sup>2</sup> We think the true test of liability in such cases is that adopted by the Supreme Court of Wisconsin. "The question is not whether the mere sudden declivity in the sidewalk, in the absence of any storm or freezing, would have been dangerous, nor whether the mere storm and freezing weather with a differently constructed walk would have caused danger, but whether the walk, so constructed, with such ice and snow as would ordinarily accumulate upon it during such severe storms and freezing weather as ordinarily occurred at that season of the year, at the place of the injury, would be unsafe for travelers upon it."<sup>3</sup>

Whether a defect in a street is caused by the act of a third person or by the failure of the city to repair, there is, in general, no liability on the part of the city unless it has, or ought to have had, due notice of the defect.<sup>4</sup> It is not necessary,

<sup>1</sup> *City of Atchison v. King*, 9 Kan. 550; *Hampson v. Taylor*, 15 R. I. 83; *Adams v. Chicopee*, 147 Mass. 440; *Haskell v. Des Moines*, 74 Ia. 110.

<sup>2</sup> *Taylor v. Yonkers*, 105 N. Y. 202. It seems to us that some of the courts carry the doctrine which is involved in the general class of cases to which we have referred to a greater length than sound principle sustains, and that there is reason for restricting the doctrine.

<sup>3</sup> *Hill v. Fond du Lac*, 56 Wis. 242, 248, *Per Cassoday, J.* The doctrine of this case is, to our minds, the one most consistent with principle, for it is beyond reason to hold municipal corporations responsible for the action of the

elements to such an extent as some of the courts do.

<sup>4</sup> *City of Denver v. Dean*, 10 Col. 375, S. C. 3 Am. St. Rep. 594; *Boulder v. Niles*, 9 Col. 415; *Goodnough v. Oshkosh*, 24 Wis. 549, S. C. 1 Am. Rep. 202; *Town of Spiceland v. Alier*, 98 Ind. 467; *City of Madison v. Baker*, 103 Ind. 41; *City of Warsaw v. Dunlap*, 112 Ind. 576; *Plattsmouth v. Mitchell*, 20 Neb. 228; *Mack v. Salem*, 6 Ore. 275, *Varnham v. Council Bluffs*, 52 Ia. 698; *Hitchins v. Mayor*, 68 Md. 100, S. C. 6 Am. St. Rep. 422; *Krans v. Baltimore*, 64 Md. 491; *Montezuma v. Wilson (Ga.)*, 9 S. E. R. 17; *Klein v. Dallas*, 71 Tex. 280, S. C. 8 S. W. 90.

however, that it should have actual notice. Constructive notice is sufficient.<sup>1</sup> Wherever the defect has existed for such a length of time and under such circumstances that the city or its officers in the exercise of proper care and diligence might have obtained knowledge of the defect, notice thereof will be presumed.<sup>2</sup> Having means of knowledge and negligently remaining ignorant is equivalent to knowledge.<sup>3</sup> It is generally for the jury to determine, as a question of fact, whether a city has notice or not,<sup>4</sup> although it may become a question for the court where the facts are undisputed and but one reasonable inference can be drawn from them.<sup>5</sup> In a recent case it was held that the existence of an obstruction consisting of a plank across a sidewalk for an hour and forty-five minutes was not sufficient to charge the city with notice, and the judgment upon the verdict against the city was reversed, because the evidence failed to sustain the verdict upon that point.<sup>6</sup> But where a dangerous

<sup>1</sup>Kunz v. City of Troy, 104 N. Y. 344; Requa v. Rochester, 45 N. Y. 129, S. C. 6 Am. Rep. 52; Reed v. Northfield, 13 Pick. 94; Mayor v. Sheffield, 4 Wall. 189; Dewey v. Detroit, 15 Mich. 307; Manchester v. Hartford, 30 Conn. 118; Savage v. Bangor, 40 Me. 176, S. C. 63 Am. Dec. 658; Noble v. Richmond, 31 Gratt. 271; City of Aurora v. Bitner, 100 Ind. 396; City of Chicago v. Dalle, 115 Ill. 386; Weber v. Creston, 75 Ia. 16, S. C. 39 N. W. 126; Noyes v. Gardner, 147 Mass. 505, S. C. 18 N. E. 423, Philadelphia v. Smith (Pa.), 16 Atl. R. 493. Notice of a defect implies notice of the consequences which may be reasonably expected to result. Corts v. District of Columbia, 17 Wash. Law R. 296.

<sup>2</sup>Pomfrey v. Saratoga Springs, 104 N. Y. 459; City of Augusta v. Hafers, 61 Ga. 48, S. C. 34 Am. Rep. 95; Kibele v. Philadelphia, 105 Pa. St. 41; City of Washington v. Small, 86 Ind. 462; Board of Comm'rs v. Dombke, 94 Ind. 72; City of Evansville v. Wilter, 86 Ind. 414, Larson v. Grand Forks, 3

Dak. 307; Sterling v. Merrill, 124 Ill. 522; Adair v. Corp. of Kingston, Ont. Rep., 27 C. P. 126. And see cases cited in last note, *supra*.

<sup>3</sup>Mersey Docks v. Gibbs, 11 H. L. Cas. 687, 701, S. C. L. R. 1 H. L. 93; Knapp v. Bailey, 79 Me. 195, S. C. 1 Am. St. Rep. 295.

<sup>4</sup>Klein v. City of Dallas (Tex.), 8 S. W. Rep. 90; Kunz v. City of Troy, 104 N. Y. 344; Colley v. Westbrook, 57 Me. 181, S. C. 2 Am. Rep. 30; Hall v. Lowell, 10 Cush. 260; Sheel v. Appleton, 49 Wis. 125.

<sup>5</sup>Railroad Co. v. Stout, 17 Wall. 657.

<sup>6</sup>City of Warsaw v. Dunlap, 112 Ind. 576. See, also, City of Madison v. Baker, 103 Ind. 41, 44; City of Chicago v. McCarthy, 75 Ill. 602; Blakely v. Troy, 18 Hun. (N. Y.) 167; Carrington v. St. Louis, 89 Mo. 208, S. C. 14 Am. & Eng. Corp. Cas. 471; City of Ft. Wayne v. DeWitt, 47 Ind. 391; Littlefield v. Norwich, 40 Conn. 406. Fifteen minutes has been held insufficient. Chapman v. Mayor, 55 Ga. 566. So has a period of five hours. Klatt v.

obstruction had existed for three weeks, it was held a sufficient time to charge the city with notice,<sup>1</sup> and in a number of cases, notice has been presumed where the obstruction existed for several months.<sup>2</sup> The length of time during which a defect or an obstruction is required to exist in order to charge a city with notice must, however, depend largely on the nature of the defect, and the circumstances of the particular case.<sup>3</sup>

Municipal corporations must take notice of the tendency of timber to decay,<sup>4</sup> and wherever the exercise of ordinary care involves the anticipation of defects that are the natural and ordinary result of use and climatic influences, and there is neglect on the part of the proper officer to make a sufficiently frequent examination of a particular structure, a city will not be relieved from liability although the defect may not be open and notorious.<sup>5</sup> Where the defect is caused by the municipality itself, or where it makes the improvement, it is bound to take notice of such defects as ordinary skill and prudence will reveal, for there is a clear distinction between cases where the defect is caused by

Milwaukee, 53 Wis. 196; *Springer v. Philadelphia* (Pa.), 12 Atl. Rep. 490. See, also, *Hiner v. Fond du Lac*, 71 Wis. 74, S. C. 36 N. W. 632.

<sup>1</sup> *Studley v. Oshkosh*, 45 Wis. 380; *Pomfrey v. Saratoga Springs*, 104 N. Y. 459. See, also, *Atlantic v. Champe*, 66 Ga. 659; *Grand Rapids v. Wyman*, 46 Mich. 516.

<sup>2</sup> *City of Evansville v. Wilter*, 86 Ind. 414; *Board of Comm'rs v. Brown*, 89 Ind. 48; *City of Chicago v. Crooker*, 2 Ill. App. 279; *Purple v. Greenfield*, 138 Mass. 1; *Smith v. Leavenworth*, 15 Kan. 81; *Moore v. Minneapolis*, 19 Minn. 300.

<sup>3</sup> *City of Aurora v. Bitner*, 100 Ind. 396, S. C. 8 Am. & Eng. Corp. Cas. 571; *Wendell v. Troy*, 39 Barb. 329; *Hanscom v. Boston*, 141 Mass. 242; *Harriman v. Boston*, 114 Mass. 241; *Sheel v. Appleton*, 49 Wis. 125; *Chapman v. Macon*, 55 Ga. 566; *Littlefield*

*v. Norwich*, 40 Conn. 406. It has been held that it is not enough to show notice of a defective sidewalk in the vicinity, and that the notice must be of the defect which caused the injury. *Hines v. Fond du Lac*, 71 Wis. 74, S. C. 36 N. W. 632.

<sup>4</sup> *Board of Comm'rs v. Legg*, 110 Ind. 479; *Sherwood v. Dist. of Columbia*, 3 Mackey, 276, S. C. 51 Am. Rep. 776; *City of Ft. Wayne v. Coombs*, 107 Ind. 77, and authorities cited in opinion on page 88.

<sup>5</sup> *Furnell v. City*, 20 Minn. 117; *Rapho, etc., Tp. v. Moore*, 68 Pa. St. 404; *City of Denver v. Dean*, 10 Col. 375, S. C. 3 Am. St. Rep. 594; *City of Aurora v. Hillman*, 90 Ill. 61. See, also, *Kunz v. Troy*, 104 N. Y. 344, and *Vanderslice v. Philadelphia*, 103 Pa. St. 102, as to duty to inspect. And compare *Medina v. Perkins*, 48 Mich. 67.

the act of a third person and those in which it is caused by the municipality or in the cause of which it has a direct agency.<sup>1</sup>

For the purpose of showing notice of a defect in a highway on the part of the authorities, evidence of previous accidents at the same place similar to the one complained of is admissible;<sup>2</sup> and evidence that a bridge was out of repair at other points than the exact place where the accident occurred was held admissible, in a recent case, to show such a general defective condition of the bridge as would charge the authorities with notice.<sup>3</sup> So, in an action against a city for an injury caused by falling into an open cesspool, the cover of which had floated off during a rain, evidence was admitted showing that the cover had floated off several times before under similar circumstances.<sup>4</sup>

Where actual notice is relied upon to charge a city with negligence respecting streets it is sufficient if brought home to a proper officer charged with their maintenance and supervision.<sup>5</sup> Thus, notice to a street commissioner, or a road overseer, is notice to the corporation.<sup>6</sup> So, where the police are charged with the duty of removing obstructions from the streets, notice to a policeman on duty of an obstruction is sufficient.<sup>7</sup> Notice

<sup>1</sup> *Atlanta v. Buchanan*, 76 Ga. 585; *Birmingham v. McCray*, 84 Ala. 46, S. C. 27 Cent. L. J. 598; *Adams v. Oshkosh*, 71 Wis. 49, S. C. 36 N. W. R. 614; *City of Warsaw v. Dunlap*, 112 Ind. 576; *Board of Comm'rs v. Pearson (Ind.)*, 22 N. E. R. 134.

<sup>2</sup> *City of Delphi v. Lowery*, 74 Ind. 520, S. C. 39 Am. Rep. 98; *City of Goshen v. England*, 119 Ind. 368; *Darling v. Westmoreland*, 52 N. H. 401, S. C. 13 Am. Rep. 55; *Quinlan v. Utica*, 74 N. Y. 603; *Pomfrey v. Saratoga Springs*, 104 N. Y. 459; *Chicago v. Powers*, 42 Ill. 169; *Kent v. Lincoln*, 32 Vt. 591; *City of Augusta v. Hafers*, 61 Ga. 48, S. C. 34 Am. Rep. 95; *Dist. of Columbia v. Armes*, 107 U. S. 519. *Contra*, *Collins v. Dorchester*, 6 Cush. 396; *Blair v. Pelham*, 118 Mass. 420.

<sup>3</sup> *Spearbracker v. Larrabee*, 64 Wis. 573. To same effect, *Armstrong v.*

*Ackley (Ia.)*, 32 N. W. Rep. 180; *City of Aurora v. Hillman*, 90 Ill. 61; *Platts-mouth v. Mitchell*, 20 Neb. 228. Compare *Dundas v. Lansing (Mich.)*, 42 N. W. Rep. 1011; *Hines v. Fond du Lac*, 71 Wis. 74.

<sup>4</sup> *Post v. Boston*, 141 Mass. 189.

<sup>5</sup> 2 *Shearm. & Redf. on Neg.* (4th ed.), section 368.

<sup>6</sup> *Scranton v. Catterson*, 94 Pa. St. 202; *Parish v. Eden*, 62 Wis. 272; *Rogers v. Shirley*, 74 Me. 144; *Welch v. Portland*, 77 Me. 384. Notice to one of three supervisors is notice to all and to the town. *Bailey v. Spring Lake (Wis.)*, 5 Am. & Eng. Corp. Cas. 651.

<sup>7</sup> *Rehberg v. New York*, 91 N. Y. 137, S. C. 2 Am. & Eng. Corp. Cas. 529; *Goodfellow v. New York*, 100 N. Y. 15; *Twogood v. New York*, 102 N. Y. 216; *City of Denver v. Dean*, 10 Col. 375, S. C. 3 Am. St. Rep. 594, S.

to a councilman has also been held sufficient,<sup>1</sup> and in Maine the Supreme Court has taken the extreme position that notice to individual citizens is notice to the city.<sup>2</sup> On the other hand, several of the courts, in accordance with what seems to us the better reason, have held that notice to a councilman, not at the time engaged in any duty owing to the city, is not, of itself, sufficient to charge the city with actual knowledge.<sup>3</sup> Notice to a city marshal is not sufficient in Iowa.<sup>4</sup> And we think that, upon principle, a city ought not to be charged with actual notice in any case unless the officer or person having the knowledge is in some way charged with the duty of maintaining, repairing, or looking after the streets.

An entry, made by a policeman in a book kept in the office of the city messenger for the purpose of entering complaints as to the condition of the streets and sidewalks, was held admissible, in a recent case, to show notice on the part of the city of a defect in one of its streets, it being also in evidence that the superintendent of streets had access to such book and had made repairs in consequence of similar notices.<sup>5</sup> So, evidence of a prior notice given by a city to other parties to repair a defect is admissible to show that the city had knowledge of such defect.<sup>6</sup> Evidence that a supervisor was notified of the dangerous character of a road has also been held admissible, although no particular part was designated.<sup>7</sup>

C. 20 Am. & Eng. Corp. Cas. 336; *Carrington v. St. Louis (Mo.)*, 4 West. Rep. 679.

<sup>1</sup> *City of Logansport v. Justice*, 74 Ind. 378, S. C. 39 Am. Rep. 79; *Carter v. Monticello*, 68 Ia. 178; *City of Aurora v. Hillman*, 90 Ill. 61; *Dundas v. City of Lansing (Mich.)*, 42 N. W. Rep. 1011.

<sup>2</sup> *Mason v. Ellsworth*, 32 Me. 271; *Tuell v. Paris*, 23 Me. 556; *Rogers v. Shirley*, 74 Me. 144. *Contra*, *Donaldson v. Boston*, 16 Gray (Mass.), 508.

<sup>3</sup> *Vanderslice v. Philadelphia*, 103 Pa. St. 102; *McDermott v. Kingston*, 19 Hun. 198; *Bush v. Geneva*, 3 Thomp. & C. 409. See, also, dissenting opinion

in *City of Logansport v. Justice*, 74 Ind. 378, S. C. 39 Am. Rep. 79.

<sup>4</sup> *Cook v. Anamosa*, 66 Ia. 427, S. C. 8 Am. & Eng. Corp. Cas. 568. But it may be in Kansas. *Salina v. Trosper*, 27 Kan. 544.

<sup>5</sup> *Blake v. Lowell*, 143 Mass. 296, S. C. 9 N. E. Rep. 627.

<sup>6</sup> *City of Aurora v. Pennington*, 92 Ill. 564; *Haskell v. Penn Yan*, 5 Lans. 43. But evidence of repairs after the accident is not admissible to prove notice. *Morse v. Minn., etc., Co. (Minn.)*, 28 Alb. L. Jour. 320.

<sup>7</sup> *Burrell Tp. v. Uncapher*, 117 Pa. St. 353, S. C. 2 Am. St. Rep. 664. See, also, *Ripon v. Bettel*, 30 Wis. 614.

Although a city may have been notified of a defect in a street or sidewalk, it is not, as a general rule, liable for an injury resulting therefrom unless a sufficient time has intervened for its officers, in the exercise of reasonable diligence, to have repaired or given warning of the defect after they had or ought to have had knowledge thereof.<sup>1</sup> What is sufficient time is generally a question of fact for the jury, depending largely on the circumstances of the particular case.<sup>2</sup>

Municipal corporations are not liable for the failure to exercise duties of a legislative and discretionary nature, hence, in the absence of a statute upon the subject they are not liable for the action of mobs or riotous assemblages.<sup>3</sup> They are not liable for failing to pass or for suspending an ordinance forbidding the firing of a cannon or the use of fire-crackers upon the streets;<sup>4</sup> nor for the failure to pass or enforce ordinances against coasting upon their streets.<sup>5</sup> Nor is a municipal corporation liable to a citizen whose building stands upon a public alley, for damages sustained by the falling of the walls of a building standing upon the opposite side of the alley, belonging to another citizen and negligently permitted by him to become dan-

<sup>1</sup> *Billings v. Worcester*, 102 Mass. 329; *Smith v. Mayor*, 66 N. Y. 295; *Centralia v. Krouse*, 64 Ill. 19; *Doulton v. Clinton City*, 33 Ia. 397; *Cleveland v. St. Paul*, 18 Minn. 279; *Dewy v. Detroit*, 15 Mich. 307; *Gibson v. Johnson*, 4 Ill. App. 288.

<sup>2</sup> *Rehberg v. Mayor*, 91 N. Y. 137. In some States there are statutes requiring notice for at least twenty-four hours before any liability can attach.

<sup>3</sup> *Western College v. Cleveland*, 12 Ohio St. 375; *Robinson v. Greenville*, 42 Ohio St. 625, S. C. 51 Am. Rep. 857; *Prather v. Lexington*, 13 B. Mon. (Ky.) 559, S. C. 56 Am. Dec. 585, and note; *Baltimore v. Poultney*, 25 Md. 107; *Ely v. Supervisors*, 36 N. Y. 297. Compare *Allegheny Co. v. Gibson*, 90 Pa. St. 397.

<sup>4</sup> *Hill v. Charlotte*, 72 N. C. 55; *Tindley v. City of Salem*, 137 Mass. 171, S. C. 50 Am. Rep. 289; *Robinson v. Greenville*, 42 Ohio St. 625. See, also, *Ball v. Woodbine*, 61 Ia. 83, S. C. 47 Am. Rep. 805; *Rivers v. Augusta*, 65 Ga. 376, S. C. 38 Am. Rep. 787; *Wheeler v. Plymouth*, 116 Ind. 158.

<sup>5</sup> *Faulkner v. Aurora*, 85 Ind. 130, S. C. 44 Am. Rep. 1; *City of Lafayette v. Timberlake*, 88 Ind. 330; *Pierce v. New Bedford*, 129 Mass. 534, S. C. 37 Am. Rep. 387; *Schultz v. Milwaukee*, 49 Wis. 254, S. C. 35 Am. Rep. 779, and note; *Calwell v. Boone*, 51 Ia. 687; *Burford v. Grand Rapids*, 53 Mich. 98. Compare *Mayor v. Marriott*, 9 Md. 160.

gerous, although the city marshal volunteered to take charge thereof and have the walls torn down if necessary.<sup>1</sup>

Generally, where an independent contractor is employed to perform a work lawful in itself and not intrinsically dangerous, the employer is not liable for the wrongful acts or negligence of such contractor.<sup>2</sup> The rule is more fully and precisely stated by Judge Cooley, who says: "Where the contract is for something that may lawfully be done, and is proper in its terms, and there has been no negligence in selecting a suitable person to contract with in respect to it, and no general control reserved, either as respects the manner of doing the work or the agents to be employed in doing it, and the person for whom the work is to be done is interested only in the ultimate result of the work, and not in the several steps as it progresses, the latter is neither liable to third persons for the negligence of the contractor as his master, nor is he master of the persons employed by the contractor, so as to be responsible to third persons for their negligence."<sup>3</sup> This statement of the law contains within itself an explanation of the meaning of the term "independent contractor," and a similar definition is given by the authors of a valuable work on negligence. Such a contractor is said by them to be "a person who, in the pursuit of an independent business, undertakes to do specific jobs of work for other persons without submitting himself to their control in respect to all the petty details of the work. \* \* \* And the true test by which to determine whether one who renders service to another does so as a contractor or not, is to ascertain whether he renders the service in the course of an independent occupation, representing the will of his employer only as to the *result* of his

<sup>1</sup>City of Anderson v. East, 117 Ind. 126, S. C. 10 Am. St. R. 35; Kiley v. City of Kansas, 87 Mo. 103.

<sup>2</sup>Davy v. Levy, 39 La. Ann. 551, S. C. 4 Am. St. R. 225; Ryan v. Curran, 64 Ind. 345, S. C. 31 Am. R. 123; Doo-ley v. Town of Sullivan, 112 Ind. 451; Leeds v. City of Richmond, 102 Ind. 372; Fink v. Missouri, etc., Co., 82 Mo. 283; City of Erie v. Caulkins, 85 Pa.

St. 247, S. C. 27 Am. Rep. 642; Brown v. Werner, 40 Md. 15; Callahan v. Burlington, 23 Ia. 562; Eaton v. Euro-  
pean, etc., R. R. Co., 59 Me. 520; Pack v. New York, 8 N. Y. 222; Kelly v. New York, 11 N. Y. 432; Herrington v. Lansingburgh, 110 N. Y. 145. And see authorities cited in note to Stone v. Cheshire R. R. Co., 51 Am. Dec. 201.

<sup>3</sup>Cooley on Torts, 548.

work, and not as to the means by which it is accomplished."<sup>1</sup> The fact that the contractor is paid by the day,<sup>2</sup> or that the employer pays the contractor's servants,<sup>3</sup> does not necessarily destroy the independent character of the employment.

These rules apply to cities as well as to other employers; but a city can not, either by contract or ordinance, relieve itself from the duty to keep its streets in repair and safe for travel by attempting to impose it upon others.<sup>4</sup> Thus, if it knowingly permits a dangerous excavation to negligently remain open and unguarded so as to constitute a defect in the street, rendering it unsafe for travel, the city can not escape liability to one injured thereby on the ground that the work had been let to an independent contractor;<sup>5</sup> and this is true although the city may not yet have accepted the work,<sup>6</sup> and although the contract itself may have provided that due care should be taken by the contractor, or that he should be liable for injuries occasioned by his neglect.<sup>7</sup> So, where the work is controlled by the corpora-

<sup>1</sup> Shearm. & Redf. on Neg. (2d ed.), section 73; 2 Thomp. Neg., 899, section 22. And, generally, where the contractor is subject to no control and under no directions outside of the written contract, he acts as an independent principal. *McGuire v. Grant*, 25 N. J. L. 356; *Hale v. Johnson*, 80 Ill. 185; *McCafferty v. Spuyten Duyvil, etc.*, R. R. Co., 61 N. Y. 178, S. C. 19 Am. R. 267; *Hilsdorf v. St. Louis*, 45 Mo. 94, S. C. 100 Am. Dec. 352. See, also, note to *Stone v. Cheshire, R. R. Co.*, 51 Am. Dec. 202.

<sup>2</sup> *Corbin v. America Mills*, 27 Conn. 274; *Forsythe v. Hooper*, 11 Allen, 419; *Harrison v. Collins*, 86 Pa. St. 153, S. C. 27 Am. Rep. 699.

<sup>3</sup> *Rourke v. White Moss Colliery Co.*, 1 C. P. Div. 556.

<sup>4</sup> *Watson v. Tripp*, 11 R. I. 98, S. C. 23 Am. R. 420; *Mayor v. Railroad Co.*, 49 N. Y. 657; *Bruso v. Buffalo*, 90 N. Y. 679; *City of Logansport v. Dick*, 70 Ind. 65, S. C. 36 Am. R. 166, 176; *City of Nashville v. Brown*, 9 Heisk.

(Tenn.) 1, S. C. 24 Am. Rep. 289; *City of Jacksonville v. Drew*, 19 Fla. 106, S. C. 45 Am. Rep. 5; *Eyler v. County Comm'rs*, 49 Md. 257, S. C. 33 Am. R. 249; *Campbell v. Stillwater*, 32 Minn. 308.

<sup>5</sup> *Storrs v. Utica*, 17 N. Y. 104; *Welsh v. St. Louis*, 73 Mo. 71; *City of St. Paul v. Seitz*, 3 Minn. 297. See, also, *Mayor v. O'Donnell*, 53 Md. 110, S. C. 36 Am. Rep. 395; *Circleville v. Neuding*, 41 Ohio St. 465, and authorities cited in last note, *supra*. *Contra*, *Painter v. Mayor*, 46 Pa. St. 213; *Barry v. St. Louis*, 17 Mo. 121.

<sup>6</sup> *Turner v. Newburgh*, 109 N. Y. 301, S. C. 4 Am. St. Rep. 453. Compare *Vogel v. Mayor*, 92 N. Y. 10.

<sup>7</sup> *Wilson v. City of Wheeling*, 19 W. Va. 323, S. C. 42 Am. Rep. 780; *Storrs v. Utica*, 17 N. Y. 104; *Mayor v. O'Donnell*, 53 Md. 110, S. C. 36 Am. Rep. 395, 398. Nor does a provision in the contract for indemnifying the city make any difference. *Blake v. Ferris*, 5 N. Y. 48; *Kelly v. Mayor*, 11 N. Y. 432. In Cali-



tion, and is done under its direction, the city is liable for the negligence of the workmen, although they were employed by one who had contracted to do the work for a stipulated sum.<sup>1</sup> But the mere fact that the work is to be done to the satisfaction of the city civil engineer will not make the city liable for the negligence of an independent contractor.<sup>2</sup>

In any case, if the work contracted for is a nuisance or intrinsically dangerous, the city will be responsible for any injury resulting directly from the acts which the contractor was employed to perform.<sup>3</sup> So, where a city licenses a person to do an act dangerous in itself, or if it has or ought to have notice, that its licensee has acted in a negligent manner and left its streets in an unsafe and a dangerous condition, it will be responsible therefor.<sup>4</sup> But with these exceptions, it is not, ordi-

fornia it is held that there is no liability, as the law compels the contract to be let to the lowest bidder. *James v. San Francisco*, 6 Cal. 528, S. C. 65 Am. Rep. 526.

<sup>1</sup> *Lowell v. Boston*, 23 Pick. 24; *Dressell v. Kingston*, 32 Hun. (N. Y.) 533. See, also, *Linnehan v. Rollins*, 137 Mass. 123, S. C. 50 Am. Rep. 287; *Faren v. Sellers & Co.*, 39 La. Ann. 1011, S. C. 4 Am. St. Rep. 256.

<sup>2</sup> *City of Erie v. Caulkins*, 85 Pa. St. 247, S. C. 27 Am. Rep. 642; *Blumb v. Kansas City*, 84 Mo. 112; *Pack v. Mayor*, 8 N. Y. 222; *People v. Campbell*, 82 N. Y. 247. To same effect, *Samuelson v. Cleveland, etc., Co.*, 49 Mich. 164, S. C. 43 Am. Rep. 456. But the city was held liable for an explosion of water pipes, in a recent case, where its engineer prepared the plans and specifications. *City of Harrisburg v. Saylor*, 87 Pa. St. 216. And see *Faren v. Sellers*, 39 La. Ann. 1011, S. C. 4 Am. St. Rep. 256; *City of Denver v. Rhodes*, 9 Col. 554; *City of Seattle v. Busby*, 2 Am. & Eng. Corp. Cas. 503.

<sup>3</sup> *Robbins v. Chicago*, 4 Wall. 657;

*Van Winter v. Henry Co.*, 61 Ia. 685, S. C. 2 Am. & Eng. Corp. Cas. 512; *City of Joliet v. Harwood*, 86 Ill. 110; *Ware v. St. Paul Water Co.*, 2 Abb. (U. S.) 261; *City of Detroit v. Cary*, 9 Mich. 165; *Ellis v. Sheffield Gas Co.*, 2 El. & B. 767; *City of Cincinnati v. Stone*, 5 Ohio St. 38; *Eaton v. E. & N. R. R. Co.*, 59 Me. 520, S. C. 8 Am. R. 430; *Caswell v. Cross*, 120 Mass. 545. So, although the work is not necessarily a nuisance when properly performed, if it becomes so by reason of the negligence of the contractor and the city accepts it in that condition, the city will be liable. *Vogel v. Mayor*, 92 N. Y. 10, S. C. 2 Am. & Eng. Corp. Cas. 537. See, also, *City of Crawfordsville v. Bond*, 96 Ind. 236.

<sup>4</sup> *Russell v. Columbia*, 74 Mo. 480, S. C. 41 Am. Rep. 325; *Stephens v. Macon*, 83 Mo. 345; *City of Indianapolis v. Doherty*, 71 Ind. 5; *City of Savannah v. Donnelly*, 71 Ga. 258; *Estelle v. Lake Crystal*, 27 Minn. 243; *Cohen v. New York*, 113 N. Y. 532, S. C. 10 Am. St. Rep. 506.

narily, liable for the acts of its licensees.<sup>1</sup> While a municipal corporation is not liable where it rightfully licenses third persons to use its streets, still, it can not, by a license, abdicate its powers or surrender its duty, and it remains bound to exercise a general supervisory duty. It is not, however, liable for the acts of its licensees unless it is negligent in respect to its own duty, and it is, therefore, necessary, in order to charge the municipality, to show much more than negligence on the part of its licensee.<sup>2</sup>

As in other cases of negligence, so where an action is brought for damages, on account of injuries from defective highways, the plaintiff can not, according to the prevailing doctrine, recover if he has himself been guilty of contributory negligence.<sup>3</sup> The degree of care required on his part is, in general, such as persons of common and reasonable prudence ordinarily exercise under like circumstances.<sup>4</sup> Travelers must observe the presence of lawful obstructions,<sup>5</sup> and notorious defects,<sup>6</sup> and must exercise a degree of care proportionate to the increased danger, that is to say, the traveler must exercise ordinary care under the circumstances, and if they are such as to require unusual precautions, he must act accordingly.<sup>7</sup> He walks, as it

<sup>1</sup> *Susquehanna v. Simmons*, 112 Pa. St. 384, S. C. 56 Am. Rep. 317, S. C. 13 Am. & Eng. Corp. Cas. 449; *City of Warsaw v. Dunlap*, 112 Ind. 576, S. C. 18 Am. & Eng. Corp. Cas. 263; *Hunt v. New York*, 109 N. Y. 134; *Macomber v. Taunton*, 100 Mass. 255.

<sup>2</sup> *City of Cleveland v. King*, 10 Supreme Ct. R. 90, S. C. 28 Fed. Rep. 835.

<sup>3</sup> *Arery v. Newton*, 148 Mass. 598; *Laney v. Chesterfield County (So. C.)*, 7 S. E. R. 56; *Philips v. Ritchie County*, 31 W. Va. 477, S. C. 7 S. E. R. 427; *Moore v. Huntington*, 31 W. Va. 842, S. C. 8 S. E. R. 512; *Plymouth v. Miller*, 117 Ind. 324, S. C. 20 N. E. R. 235; *Jochem v. Robinson*, 72 Wis. 199, S. C. 1 Lawyers R. Ann. 178; *Alleghany County v. Broadwaters*, 69 Md. 533, S. C. 16 Atl. R. 223; *Dale v. Webster*

*County*, 76 Ia. 370, S. C. 41 N. W. 1. See Beach on Contributory Negligence, section 77.

<sup>4</sup> 2 Shearm. & Red. on Neg. (4th ed.), section 375; *Minick v. Troy*, 83 N. Y. 514; *Morrell v. Peck*, 88 N. Y. 398; *Farrar v. Greene*, 32 Me. 574; *City of St. Paul v. Kirby*, 8 Minn. 154; *Massey v. Columbus*, 75 Ga. 658.

<sup>5</sup> *Nolan v. King*, 97 N. Y. 565; *Jacobs v. Bangor*, 16 Me. 187; *City of Vicksburg v. Hennessey*, 54 Miss. 391; *Buesching v. St. Louis Gas Light Co.*, 6 Mo. App. 85.

<sup>6</sup> *Lovenguth v. Bloomington*, 71 Ill. 238; *Hill v. Seekonk*, 119 Mass. 85.

<sup>7</sup> *Rockford v. Hildebrand*, 61 Ill. 155; *Emporia v. Schmidling*, 33 Kan. 485; *City of Indianapolis v. Cook*, 99 Ind. 10, 13.

has been said, somewhat too strongly, "by a faith justified by law," and has a right, in the absence of anything to the contrary, to presume that the highway is reasonably safe for travel.<sup>1</sup> The fact that he voluntarily attempts to pass, with knowledge of the defect or obstruction, is not ordinarily conclusive evidence of a want of due care,<sup>2</sup> but if he has, or ought to have, notice thereof, he must exercise such care as the circumstances demand, and if an ordinarily prudent person would not attempt to pass, under the circumstances, he will be guilty of contributory negligence.<sup>3</sup> The lame, the halt and the blind are entitled

<sup>1</sup> *Davenport v. Ruckman*, 37 N. Y. 568; *Board v. Legg*, 110 Ind. 479; *City of Indianapolis v. Gaston*, 58 Ind. 224; *Turner v. Newburg*, 109 N. Y. 301, S. C. 4 Am. St. Rep. 453; *McGuire v. Spence*, 91 N. Y. 303; *Gordon v. Richmond (Va.)*, 18 Am. & Eng. Corp. Cas. 251. The presumption does not warrant the omission of such care as ordinary prudence requires, and the statement quoted is correct only in a limited sense.

<sup>2</sup> *Lyman v. Amherst*, 107 Mass. 339; *Gilbert v. Boston*, 139 Mass. 313; *Bullock v. New York*, 99 N. Y. 654; *Divney v. Elmira*, 51 N. Y. 506; *Shook v. Cohoes*, 108 N. Y. 648; *Kenworthy v. Ironton*, 41 Wis. 647; *Weed v. Balloston*, 76 N. Y. 329; *Maultby v. Leavenworth*, 28 Kan. 745; *Maw v. Township*, 8 Ont. App. 248, S. C. 2 Am. & Eng. Corp. Cas. 676; *Jeffrey v. Keokuk, etc., Co.*, 56 Ia. 546; *Aurora v. Dale*, 90 Ill. 46; *Bronson v. Southbury*, 37 Conn. 199; *City of Montgomery v. Wright*, 72 Ala. 411; *City of Huntington v. Breen*, 77 Ind. 29; *Harris v. Tp. of Clinton*, 64 Mich. 447, S. C. 8 Am. St. Rep. 842; *Copeland v. Corporation of Blenheim*, 9 Ont. Rep. 19, C. P. Div. Knowledge of the existence of the defect or obstruction is not decisive of the question of contributory fault, but it is always an important element to be considered in determining that question,

and, indeed, it not unfrequently turns the scale. If the existence of the defect or obstruction is known and the danger is so great that a man of ordinary prudence would not encounter it, then one who voluntarily attempts to pass it where there is no reasonable necessity impelling him to make the attempt, is guilty of such contributory negligence as will bar a recovery. *The Evansville, etc., Co. v. Crist*, 116 Ind. 453; *Town of Gosport v. Evans*, 112 Ind. 133; *City of Richmond v. Mulholland*, 116 Ind. 173; *Penna. Co. v. Varnau (Pa.)*, 15 Atl. R. 624; *Gulf, etc., Co. v. Gascamp*, 69 Tex. 545, S. C. 7 S. W. R. 227; *Fulliam v. City of Muscatine (Ia.)*, 30 N. W. R. 861; *Skjegerud v. Minneapolis, etc., Co.*, 38 Minn. 56, S. C. 35 N. W. 572; *Gordon v. Richmond*, 83 Va. 436, S. C. 2 S. E. 727.

<sup>3</sup> *Hubbard v. Concord*, 35 N. H. 52; *Horton v. Ipswich*, 12 Cush. 488; *Nicks v. Marshall*, 24 Wis. 139; *Fox v. Glas-tonbury*, 29 Conn. 204; *Crescent v. Anderson (Pa.)*, 8 Atl. Rep. 379; *City Erie v. Magill*, 101 Pa. St. 616; *Schaeffer v. Sandusky*, 33 Ohio St. 246; *Gosport v. Evans*, 112 Ind. 133. See, also, *Hutton v. Corporation of Windsor*, 34 Upper Can. Rep. Q. B. 487; *Burns v. Corporation of Toronto*, 42 Upper Can. Q. B. 560.

to use the highways as well as others,<sup>1</sup> but they must exercise more than usual care if their infirmities make it necessary.<sup>2</sup> The increased acuteness and fidelity of the other senses, the habit of the plaintiff to go about alone, and his acquaintance with the locality may all be considered in such cases, upon the question of his freedom from contributory negligence.<sup>3</sup> It is not negligent *per se* to travel after night, although greater vigilance may be required than in the day time.<sup>4</sup> The question of contributory negligence is generally for the jury to determine from the circumstances of the case.<sup>5</sup>

The following cases illustrate the principles above stated in regard to contributory negligence, and show their application to particular facts. Where the plaintiff, assuming that a sidewalk was safe, and knowing nothing to the contrary, permitted her attention to be momentarily attracted to some children playing in the street, and fell into a hole in the sidewalk from which the cover had been removed, she was held not guilty of con-

<sup>1</sup> *Davenport v. Ruckman*, 37 N. Y. 568; *Harris v. Uebelhoefer*, 75 N. Y. 169; *Requa v. Rochester*, 45 N. Y. 129; *Neff v. Wellesly*, 148 Mass. 487, S. C. 20 N. E. R. 111; *Frost v. Waltham*, 12 Allen, 85. Nor is it necessarily negligence to drive a blind horse. *Wright v. Templeton*, 132 Mass. 49.

<sup>2</sup> *Winn v. Lowell*, 1 Allen (Mass.), 177.

<sup>3</sup> *Sleeper v. Sandown*, 52 N. H. 244; *Smith v. Wildes*, 143 Mass. 556.

<sup>4</sup> *Stier v. Oskaloosa*, 41 Ia. 353; *Prideaux v. Mineral Point*, 43 Wis. 513; *Copeland v. Corp. of Blenheim*, 9 Ont. Rep. C. P. Div. 19. The failure to carry a lantern on a dark night is not necessarily conclusive evidence of contributory negligence. *Allegheny Co. v. Broadwaters*, 69 Md. 533, S. C. 16 Atl. R. 223. But we suppose there may be circumstances under which it would be negligence to use a highway in the nighttime without a lantern.

<sup>5</sup> *Daniels v. Lebanon*, 58 N. H. 284;

*Maloy v. New York Central R. R. Co.*, 58 Barb. 182; *Diveny v. Elmira*, 51 N. Y. 506; *Niven v. Rochester*, 76 N. Y. 619; *Hart v. Red Cedar*, 63 Wis. 634; *Kelsey v. Glover*, 15 Vt. 708; *Baltimore v. Holmes*, 39 Md. 243; *Ramsey v. R. & M. Gravel Road Co.*, 81 Ind. 394; *Town of Albion v. Hedrick*, 90 Ind. 545; *Indiana Car Co. v. Parker*, 100 Ind. 181; *Ponca v. Crawford*, 23 Neb. 662, S. C. 8 Am. St. R. 144. But where the facts are undisputed, and but one reasonable inference can be drawn from them, the question is one of law for the court. *Cooley on Torts*, 670, 671; *Conner v. Citizens, etc., Co.*, 105 Ind. 62; *City of Indianapolis v. Cook*, 99 Ind. 10; *City of Montgomery v. Wright*, 72 Ala. 411, S. C. 5 Am. & Eng. Corp. Cas. 642; *Purcell v. English*, 86 Ind. 34; 2 *Thomp. Neg.* 1236, 1237; *Stackus v. New York Cent. R. R. Co.*, 79 N. Y. 464; *Davenport v. Brooklyn, etc., R. R. Co.*, 32 Alb. Law Jour. 516.

tributory negligence.<sup>1</sup> One who knows of the dangerous character of an obstruction or defect, yet deliberately and unnecessarily steps upon or into it, when he might just as well have stepped around it, takes the risk of injury upon himself.<sup>2</sup> Thus, where the plaintiff, while absorbed in thought and not looking where he was going, fell into a pit which he knew existed, and into which he himself had once before fallen, he was held guilty of contributory negligence.<sup>3</sup> A similar ruling was made by another court where the plaintiff fell over a small water-box in the sidewalk, the existence of which was known to him, although it was dark at the time and difficult to see.<sup>4</sup> So, where the plaintiff, being in a strange city and accompanied by a person well acquainted with the surroundings, bearing a lantern, knew that he was near a stream, yet left his guide, and, walking into the darkness, fell through an opening in a bridge into the water, it was held that he could not recover because of his contributory negligence.<sup>5</sup> Attempting to drive over a causeway during a freshet has been held a want of ordinary prudence;<sup>6</sup> and unskillful or violent driving may constitute contributory negligence,<sup>7</sup> but permitting a woman to drive is not necessarily a want of ordinary care.<sup>8</sup> Riding or driving at a high rate of speed is not negligence *per se*,<sup>9</sup> nor is it ne-

<sup>1</sup> *Barry v. Terkildsen*, 72 Cal. 254, S. C. 1 Am. St. Rep. 55. To same effect, *Hussey v. Ryan*, 64 Md. 426; *Jennings v. Van Schaick*, 108 N. Y. 530, S. C. 2 Am. St. Rep. 459; *Kelley v. Blackstone*, 147 Mass. 448, S. C. 18 N. E. R. 217.

<sup>2</sup> *Gosport v. Evans*, 112 Ind. 133, S. C. 2 Am. St. Rep. 164; *Schaeffler v. Sandusky*, 33 Ohio St. 246, S. C. 31 Am. Rep. 533; *Corlett v. Leavenworth*, 27 Kan. 673; *Erie v. Magill*, 101 Pa. St. 616; *Fulliam v. Muscatine*, 70 Ia. 436; *City of Quincy v. Barker*, 81 Ill. 300, S. C. 25 Am. Rep. 278.

<sup>3</sup> *Walker v. Reidsville* (N. C.), 2 S. E. R. 74.

<sup>4</sup> *City of Indianapolis v. Cook*, 99 Ind. 10. See, also, *Dubois v. Kingston*, 102 N. Y. 219. But the decision in

*City v. Cook*, *supra*, is of doubtful soundness.

<sup>5</sup> *Cummins v. Syracuse*, 100 N. Y. 637.

<sup>6</sup> *Fox v. Glastenbury*, 29 Conn. 204. Compare *Merrill v. North Yarmouth*, 78 Me. 200, S. C. 57 Am. Rep. 794.

<sup>7</sup> *Peoria Bridge Association v. Loomis*, 20 Ill. 235; *Butterfield v. Forrester*, 11 East, 60; *Abbott v. Wolcott*, 38 Vt. 666; *Tuffree v. State Center*, 57 Ia. 538; *Tuttle v. Lawrence*, 119 Mass. 276; *Flower v. Adam*, 2 Taunt. 314.

<sup>8</sup> *Cobb v. Standish*, 14 Me. 198; *Bigelow v. Rutland*, 4 Cush. 247; *Snow v. Provincetown*, 120 Mass. 580; *Hasenyer v. Railroad Co.*, 48 Mich. 205.

<sup>9</sup> *Brennan v. Friendship*, 67 Wis. 223; *Reed v. Deerfield*, 8 Allen, 522.

cessarily a want of ordinary care to drive after night during a violent storm.<sup>1</sup>

In some of the States there are statutes prescribing that a wagon load shall not exceed a certain weight, and where this is true, it is held that there can be no recovery for injuries to an overloaded wagon, no matter how defective the road may be or how much care its owner may exercise.<sup>2</sup> So, in Maine, Massachusetts and Vermont, it is held, under their respective statutes, that a traveler on Sunday can not recover for injuries caused by defects in a highway, unless his errand is one of necessity or charity,<sup>3</sup> but this doctrine has no application in other States, where such statutes do not exist, and even where similar statutes do exist they are not construed as preventing an action by the person violating their provisions, where the violation in no way contributed to his injury.<sup>4</sup> In some of the New England States where the liability of municipalities is wholly statutory, the right to maintain an action for damages for injuries caused by defective highways is confined to *travelers*, and it is held that a child playing upon the street,<sup>5</sup> or a person stopping by the wayside to converse,<sup>6</sup> is not entitled, as a traveler, to complain of defects in the way. But a more liberal rule generally prevails. In other States it is held that a city owes substantially the same duties to children, properly upon the streets, although engaged in play, as it does to travelers on business.<sup>7</sup> So, a

<sup>1</sup> *Milwaukee v. Davis*, 6 Wis. 377. See, also, *Hart v. Red Cedar*, 63 Wis. 634; *Clark v. Lockport*, 49 Barb. 580; *Brackenridge v. Fitchburg*, 145 Mass. 160.

<sup>2</sup> *Howe v. Castleton*, 25 Vt. 162.

<sup>3</sup> 1 *Shearm. & Redf. on Neg.* (4th ed.), section 104; 2 *Id.*, section 381; *Johnson v. Irasburgh*, 47 Vt. 28, S. C. 19 Am. Rep. 111; *Bosworth v. Swansey*, 10 Metc. 363; *Hinckley v. Penobscot*, 42 Me. 89; *Cooley on Torts*, 151. Compare, in Maine, *Baker v. Portland*, 58 Me. 199.

<sup>4</sup> *Platz v. Cohoes*, 89 N. Y. 219; *Sutton v. Wauwatosa*, 29 Wis. 21, 28; *Piollet v. Simmers*, 106 Pa. St. 95; *Wood-*

*man v. Hubbard*, 25 N. H. 67; *Armstrong v. Toler*, 11 Wheat. 258; *Cooley on Torts*, 157; *Shearm. & Redf. on Neg.*, section 104. See, also, *White v. Lang*, 128 Mass. 598.

<sup>5</sup> *Stinson v. Gardiner*, 42 Me. 248; *Tighe v. Lowell*, 119 Mass. 472. Compare *Hunt v. Salem*, 121 Mass. 294; *Gulline v. Lowell*, 144 Mass. 491.

<sup>6</sup> *Blodgett v. Boston*, 8 Allen, 237; *Stickney v. Salem*, 3 Allen, 374.

<sup>7</sup> *Chicago v. Keefe*, 114 Ill. 222; *Indianapolis v. Emmelman*, 108 Ind. 530; *McGuire v. Spence*, 91 N. Y. 303. Compare *Donoho v. Vulcan Iron Works*, 75 Mo. 401.

town was held liable for injuries to an elephant caused by a defect in the way.<sup>1</sup> And where a person stopped to see a procession pass it was held that he did not cease to be a traveler.<sup>2</sup> In another case the plaintiff stepped to a hydrant on an adjacent lot, about two feet from the street line, to get a drink of water, and while standing with one foot on the lot and the other on the street, was injured by the fall of building material which the city had negligently allowed to remain upon the sidewalk. It was held that he was making a reasonable and proper use of the street and might recover.<sup>3</sup> It is a general rule, however, that no one can maintain an action for a defect or an obstruction in a highway unless he has suffered some special or peculiar injury. The mere fact that he is, in common with all others who have occasion to use the way, delayed by an obstruction, will not ordinarily entitle him to damages,<sup>4</sup> but diversion of custom from a shop or colliery by an obstruction in the highway will warrant a private action,<sup>5</sup> and where one had started upon his journey but was compelled to go back by reason of an obstruction, whereby he suffered loss, it was held that he had shown "a particular damage," for which he was entitled to maintain an action.<sup>6</sup> So, an abutter has a special interest in a highway giving him the right of access to his premises, and may main-

<sup>1</sup>Gregory v. Adams, 14 Gray, 242.

<sup>2</sup>Varney v. Manchester, 58 N. H. 430. And see to same effect, Britton v. Cummington, 107 Mass. 347, where a traveler stopped to pick berries, and Babson v. Rockport, 101 Mass. 93, where he stopped to fill up a hole in the roadway.

<sup>3</sup>Duffy v. Dubuque, 63 Ia. 171, S. C. 50 Am. Rep. 743. See to same effect where a pedestrian stopped to tie his shoes on a doorstep, Murray v. McShane, 52 Md. 217, S. C. 36 Am. R. 367. See where a ruined wall fell on a child, Kiley v. Kansas City, 69 Mo. 102, S. C. 33 Am. Rep. 491.

<sup>4</sup>Sohn v. Cambern, 106 Ind. 302; Sunderland v. Martin, 113 Ind. 411;

Powell v. Bunker, 91 Ind. 64; Stetson v. Faxon, 19 Pick. 147, 161; Hubert v. Groves, 1 Esp. 148; Griffin v. Sanborn-ton, 44 N. H. 246; Maddox v. Cunningham, 68 Ga. 431; Houck v. Wachter, 34 Md. 265, S. C. 6 Am. Rep. 332; Shaubut v. St. Paul, etc., R. R. Co., 21 Minn. 502.

<sup>5</sup>Wilkes v. Hungerford Market Co., 2 Bing. 281; Iveson v. Moore, 1 Ld. Raym. 486; Stetson v. Faxon, 19 Pick. 147, S. C. 31 Am. Dec. 123.

<sup>6</sup>Rose v. Mills, 4 M. & S. 101. See, also, Milarkey v. Foster, 6 Ore. 379; Brown v. Watson, 47 Me. 161; Ewall v. Greenwood, 26 Ia. 377; Wicks v. Ross, 37 Mich. 464; Little Rock, etc., Ry Co. v. Brooks, 39 Ark. 403.

tain an action for an obstruction which cuts off his right of access.<sup>1</sup>

Notice of the injury is required, in many of the States, to be given to the city or some specified officer before an action for damages can be maintained by the injured party. Provisions of this nature, prohibiting any action against the city until the expiration of a certain time after the claim shall have been presented, are found in many city charters and in the statutes of some of the States. Such provisions are constitutional,<sup>2</sup> and are usually regarded as conditions precedent, performance of which must be alleged and proved.<sup>3</sup> Provisions are also found requiring notice to be given within a certain time after the injury was received. Such notice is likewise regarded as a condition precedent and one that, in Massachusetts at least, can not be waived.<sup>4</sup> It is not necessary that the notice should specifically and minutely describe the place where the accident occurred if it is sufficient for identification.<sup>5</sup> But it should identify the precise locality,<sup>6</sup> and indicate an intention to claim damages for the injury,<sup>7</sup> although a variance between such notice and the complaint as to the amount of damages claimed is not material.<sup>8</sup> A material variance as to the date and manner of the injury may, however, invalidate the notice.<sup>9</sup> It is held in Maine that

<sup>1</sup> *Ross v. Thompson*, 78 Ind. 90; *Cummins v. City of Seymour*, 79 Ind. 491, S. C. 41 Am. Rep. 618; *Venard v. Cross*, 8 Kan. 248; *Mahady v. Bushwick, etc., R. R. Co.*, 91 N. Y. 148; *Pittsburgh, etc., R. R. Co. v. Reich*, 101 Ill. 157; *Wilder v. DeCou*, 26 Minn. 10; note to *Stetson v. Faxon*, 31 Am. Dec. 123; *Cooley on Torts*, 616.

<sup>2</sup> *Reining v. Buffalo*, 102 N. Y. 308; *Nichols v. Minneapolis (Minn.)*, 2 Am. & Eng. Corp. Cas. 562.

<sup>3</sup> *Reining v. Buffalo*, 102 N. Y. 308; *Benware v. Pine Valley*, 53 Wis. 527; *Minick v. Troy*, 83 N. Y. 514, 516; *Jones v. Minneapolis*, 31 Minn. 230; *Marshall Co. v. Jackson Co.* 36 Ala. 613.

<sup>4</sup> *Gay v. Cambridge*, 128 Mass. 387. See, also, *Veazil v. Rockland*, 68 Me. 511; *Maddox v. Randolph Co.*, 65 Ga.

216; *Dorsey v. Racine*, 60 Wis. 292. But compare *Kent v. Lincoln*, 32 Vt. 591; *Babcock v. Guilford*, 47 Vt. 519.

<sup>5</sup> *Cloughessey v. Waterbury*, 51 Conn. 405; *Sargent v. Lynn*, 138 Mass. 599; *McCabe v. Cambridge*, 134 Mass. 484; *Pendergast v. Clinton*, 147 Mass. 402; *Liffin v. Beverly*, 145 Mass. 549; *Wall v. Highland*, 72 Wis. 435; *Fassett v. Roxbury*, 55 Vt. 552.

<sup>6</sup> *Rogers v. Shirley*, 74 Me. 144.

<sup>7</sup> *Kenady v. Lawrence*, 128 Mass. 318.

<sup>8</sup> *Minick v. Troy*, 83 N. Y. 514; *Reed v. New York*, 97 N. Y. 620; *Wyandotte v. White*, 13 Kan. 191.

<sup>9</sup> *Shaw v. Waterbury*, 46 Conn. 263; *McDougall v. Boston*, 134 Mass. 149, S. C. 2 Am. & Eng. Corp. Cas. 561; *Compare Spooner v. Freetown*, 139 Mass. 235.



the notice must be in writing, and that its sufficiency is a matter of law for the court.<sup>1</sup> Where the statute requires that the notice be served on a particular officer, it need not be put directly in his hands by the injured party, but will be sufficient if it reaches him in due time, although it first passes through the hands of others. Thus, in Massachusetts where the notice must be served on the mayor, the city clerk, or the treasurer, it was held sufficient where the notice was handed by the person injured to an alderman, and, being by him presented to the board, was referred by the board to the clerk in the regular course of business.<sup>2</sup> So, if delivered to an assistant in the city clerk's office.<sup>3</sup> If the city charter prescribes the kind of notice to be given, it must govern and should be complied with, although there may be a general statute upon the subject containing different provisions as to notice.<sup>4</sup>

<sup>1</sup> *Chapman v. Nobleboro*, 76 Me. 427,  
S. C. 5 Am. & Eng. Corp. Cas. 636.

<sup>3</sup> *McCabe v. Cambridge*, 134 Mass.  
484.

<sup>2</sup> *Wormwood v. Waltham*, 144 Mass.  
184.

<sup>4</sup> *Hines v. Fond du Lac*, 71 Wis. 74.

## CHAPTER XXIV.

### OBSTRUCTIONS AND ENCROACHMENTS.

We have considered, to some extent, the civil liability of cities and that of adjoining owners for obstructions in streets, in treating of the liability of municipal corporations for negligence and we shall also discuss it in considering the rights, remedies and liabilities of abutters. We have not, however, considered the question of criminal liability for obstructions constituting a nuisance, and a fuller treatment of the entire subject seems desirable.

Any unauthorized obstruction which unnecessarily impedes or incommodes the lawful use of a highway is a public nuisance, at common law.<sup>1</sup> Thus, it is a nuisance to place logs in a highway where they are not needed in repairing or improving it, even though they are placed at the side of the traveled path.<sup>2</sup> So, it is a nuisance to erect a gate<sup>3</sup> or a fence<sup>4</sup> across a highway, to construct a building thereon,<sup>5</sup> or to cut a ditch or mill-race across it without bridging the same or otherwise restoring the way to its former safe and convenient condition so as not to impede or endanger travel.<sup>6</sup>

<sup>1</sup> *Yates v. Warrenton*, 84 Va. 337, S. C. 4 S. E. R. 818; *Cohen v. New York*, 113 N. Y. 532, S. C. 10 Am. St. Rep. 506; *Callanan v. Gilman*, 107 N. Y. 360, S. C. 1 Am. St. Rep. 831, and note; *Clifford v. Dam*, 81 N. Y. 52; *People v. Cunningham*, 1 Denio, 524, S. C. 43 Am. Dec. 709; *State v. Merritt*, 35 Conn. 314; *State v. Mobile*, 5 Porter (Ala.), 279, S. C. 30 Am. Dec. 564; *Wood on Nuisance*, section 248.

<sup>2</sup> *Johnson v. Whitefield*, 18 Me. 286, S. C. 36 Am. Dec. 721. See, also, *Mould v. Williams*, 5 Ad. & El. 469; 1 Hawk. P. C. 76, section 48; Compare *Dubois v. Kingston*, 102 N. Y. 219.

<sup>3</sup> *James v. Hayward*, Cro. Cas. 184; *Greasly v. Codling*, 2 Bing. 263; *Smith v. State*, 23 N. J. L. 712; *Bateman v. Burge*, 6 C. & P. 391; *Adams v. Beach*, 6 Hill, 271.

<sup>4</sup> *Kelley v. Commonwealth*, 11 Serg. & R. 345; *Gregory v. Com.*, 2 Dana (Ky.), 417.

<sup>5</sup> *Stetson v. Faxon*, 19 Pick. 147; *Barker v. Com.*, 19 Pa. St. 412; *Columbus v. Jaques*, 30 Ga. 506.

<sup>6</sup> *Dyert v. Schenck*, 23 Wend. 445, S. C. 35 Am. Dec. 575; *Venard v. Cross*, 8 Kan. 248; *Burton Township v. Tuttle*, 30 Ohio St. 62; *Village of West Bend v. Mann*, 59 Wis. 69.

“Public highways belong, from side to side and end to end, to the public,”<sup>1</sup> and any permanent structure or purpresture which materially encroaches upon a public street and impedes travel, is a nuisance *per se*, and may be abated, notwithstanding space is left for the passage of the public.<sup>2</sup> This is the only safe rule; for, if one person can permanently use a highway for his own private purposes, so may all, and if it were left to the jury to determine in every case how far such an obstruction might encroach upon the way without being a nuisance, there would be no certainty in the law, and what was at first a matter of small consequence would soon become a burden not only to adjoining owners, but to all the tax payers and the traveling public as well. Thus expediency forbids any other rule. But even if it did not, the rule is well founded in principle, for it is well settled that “the public are entitled, not only to a free passage along the highway, but to a free passage along any portion of it not in the actual use of some other traveler,”<sup>3</sup> and if this be true it necessarily follows that there can be no rightful permanent use of the way for private purposes. The rule would seem upon principle, at least, to extend to country roads as well as to streets, and is thus stated by a well known English text-writer: “In the case of an ordinary highway running between fences, the right of way or passage is *prima facie*, and, unless there be evidence to the contrary, extends to the whole space between the fences, and the public are entitled to the use of the whole of it as the highway, and are not confined to the part which may be metalled or kept in order for the more convenient use of carriages and passengers. It is an indictable offence, therefore, to place posts on greensward and open places extending between the metalled part of the road and the fence

<sup>1</sup> State v. Berdett, 73 Ind. 185, 193.

<sup>2</sup> State v. Berdett, *supra*; Pettis v. Johnson, 56 Ind. 139; Commonwealth v. Wentworth, 1 Brightley N. P. (Pa.) 318; Moyamensing v. Long, 1 Par. (Pa.) 143; Commonwealth v. Blaisdell, 107 Mass. 234; People v. Vanderbilt, 28 N. Y. 396; State v. Woodward, 23 Vt. 92; Harrow v. State, 1 Greene (Ia.), 439. But compare People v. Carpenter, 1

Mich. 273; Barling v. West, 29 Wis. 307; Dubois v. Kingston, 102 N. Y. 219.

<sup>3</sup> 1 Hawk. P. C., Ch. 32, section 11; Angell on Highways, section 226; Johnson v. Whitefield, 18 Me. 286, S. C. 36 Am. Dec. 721; Commonwealth v. King, 13 Metc. 115; Hart v. Mayor, 9 Wend. 571, S. C. 24 Am. Dec. 165; Harrower v. Ritson, 37 Barb. 301.

dividing the road from the adjoining land, although the posts do not in point of fact offer any injurious obstruction to the public traffic. It is enough that they stand in the way of those who may wish to traverse the whole space between the fences.”<sup>1</sup> Those cases which hold that a city or county is not liable for obstructions or defects outside of the traveled path are not in conflict with this rule, because they rest upon an entirely different principle.

The rules above stated have been applied in many very interesting cases. Thus, upon the trial of an indictment for the continuance of a nuisance, by maintaining a building within the limits of a highway, evidence was offered to prove that the building was not within the traveled part and that a high bank had formerly occupied the place of the building; but the evidence was held, upon appeal, to have been rightfully rejected because it afforded neither justification nor excuse.<sup>2</sup> A fruit stand upon a city street has been held a nuisance *per se*,<sup>3</sup> and so has a stairway leading from a public alley to the second story of a building.<sup>4</sup> “A man has no right to eke out the inconvenience of his own premises by taking the public highway into his timber yard,”<sup>5</sup> and the owner of a city lot has no right to maintain hay-scales in the street in front of his premises, where the fee is in the city.<sup>6</sup> So, the construction of a railroad across a highway, without proper authority, constitutes an obstruction for which the company is liable to indictment.<sup>7</sup> On

<sup>1</sup> Addison on Torts, 328, section 313, citing *Reg. v. Un. King. Tel. Co.*, 31 L. J. M. C. 167; *Rex v. Wright*, 3 B. & Ad. 683. See, also, *Wright v. Saunders*, 65 Barb. (N. Y.) 214; *Harrower v. Ritson*, 37 Barb. 301; *Dickey v. Tel. Co.*, 46 Me. 483; note to *State v. Berdetta*, 38 Am. Rep. 117.

<sup>2</sup> *Commonwealth v. Wilkinson*, 16 Pick. 175, S. C. 26 Am. Dec. 654.

<sup>3</sup> *State v. Berdetta*, 73 Ind. 185, S. C. 38 Am. Rep. 117; *Com. v. Wentworth*, 1 Brightley N.P. (Pa.) 318. See *Smith v. State*, 6 Gill. 425; *Barnes v. Ward*, 14 Jur. 334; and compare *Barling v. West*, 29 Wis. 307, S. C. 9 Am. Rep. 576.

<sup>4</sup> *Pettis v. Johnson*, 56 Ind. 139; *Com. v. Blaisdell*, 107 Mass. 234. Compare *Dubois v. Kingston*, 102 N. Y. 219.

<sup>5</sup> *King v. Jones*, 3 Campb. 331. See, also, *Thorpe v. Brumfitt*, L. R., 8 Ch. App. 650; *Cushing v. Adams*, 18 Pick. 110; *Com. v. King*, 13 Metc. 115; *Wood on Nuisance*, section 257.

<sup>6</sup> *Emerson v. Babcock*, 66 Ia. 257, S. C. 55 Am. Rep. 273.

<sup>7</sup> *Com. v. Nashua, etc.*, R. R. Co., 2 Gray, 54; *Com. v. Old Colony, etc.*, R. R. Co., 14 Gray, 93; *Pittsburgh, etc.*, R. R. Co. *v. Reich*, 101 Ill. 157; *State v. Troy, etc.*, R. R. Co., 57 Vt. 144; *Fanning v. Osborne*, 102 N. Y. 441.

the other hand, it has been held that a liberty pole in a city street is not necessarily a nuisance,<sup>1</sup> and that a post maintained at a street corner to protect a shade tree is not necessarily a negligent obstruction, although partly concealed by grass and weeds.<sup>2</sup>

It is not necessary, in order to constitute a nuisance, that there should be an actual physical obstruction to the public use upon the surface of the highway, for its use may be rendered as dangerous by objects above the way as by obstructions upon the surface. Thus, it is said, in a recent case, that "the permanent and exclusive use and occupancy of any public street or highway by any person, by the erection or maintenance or any structure on, beneath or above its surface, which wrongfully obstructs or may obstruct such street or highway, is a misdemeanor, punishable as a public nuisance."<sup>3</sup> In accordance with this doctrine, a bay-window, in the second story of a house, sixteen feet above the sidewalk, projecting between three and four feet beyond the line of the street, was held a public nuisance which could not be justified by a city ordinance, and its construction was enjoined.<sup>4</sup> So, a house or a wall suffered to remain in a ruinous condition may become a nuisance;<sup>5</sup> and a permanent wooden awning, erected for private purposes, covering a sidewalk and resting upon posts imbedded in the street, is also a nuisance.<sup>6</sup>

An obstruction may be a nuisance although it is not of a permanent character.<sup>7</sup> Any unauthorized use of a highway so ex-

<sup>1</sup> *City of Allegheny v. Zimmerman*, 95 Pa. St. 287, S. C. 40 Am. Rep. 649. See, also, *McCormick v. Dist. of Columbia*, 4 Mackey, 396, S. C. 54 Am. R. 284.

<sup>2</sup> *City of Wellington v. Gregson*, 31 Kan. 99, S. C. 47 Am. Rep. 482.

<sup>3</sup> *Bybee v. State*, 94 Ind. 443, 447. See, also, *Grove v. City of Ft. Wayne*, 45 Ind. 429, S. C. 15 Am. R. 262; *Salisbury v. Herchenroder*, 106 Mass. 458, S. C. 8 Am. R. 354; *Jones v. Railroad Co.*, 107 Mass. 261; *Tarry v. Ashton*, 1 Q. B. D. 314, S. C. 45 L. J. Q. B. 260.

<sup>4</sup> *Reimer's Appeal*, 100 Pa. St. 182, S. C. 45 Am. R. 373. See, also, *Attorney*

*General v. Lombard, etc.*, R. R. Co., 1 W. N. C. (Pa.) 491; *Jenks v. Williams*, 115 Mass. 217.

<sup>5</sup> *Regina v. Watts*, 1 Salk. 357. See, also, *Garland v. Towne*, 55 N. H. 35; *Chute v. State*, 19 Minn. 271; *Vincett v. Cook*, 4 Hun. 318; *Mullen v. St. John*, 57 N. Y. 567.

<sup>6</sup> *Hume v. Mayor*, 74 N. Y. 264; *Pedrick v. Bailey*, 12 Gray, 161. Compare *Hawkins v. Sanders*, 45 Mich. 491.

<sup>7</sup> *Cohen v. New York*, 113 N. Y. 532, S. C. 10 Am. St. Rep. 506; *Osage City v. Larkin*, 40 Kan. 206, S. C. 10 Am. St. Rep. 186.

tensive or so long continued as to be unreasonable may amount to a nuisance. As we shall show in the chapter on the rights of abutters, a highway may be used temporarily, and in a reasonable manner, by an adjoining owner for loading and unloading goods or for depositing building material, whenever such use is necessary;<sup>1</sup> but if such use is prolonged for an unreasonable time, or if it is of such a nature as to unnecessarily or unduly interfere with the right of the public to pass and repass, it will constitute a nuisance.<sup>2</sup> Thus, a merchant has no right to appropriate a portion of the highway to his exclusive use for the purpose of displaying and selling his goods;<sup>3</sup> nor has he any right to so conduct his business as to attract large crowds of people in the street to the detriment of the public use.<sup>4</sup> Teamsters may not unnecessarily block the public way or stop their teams and vehicles for such a time and in such a place as to unreasonably interfere with the public travel.<sup>5</sup> And a railroad company has no right to obstruct a street by unnecessarily letting its cars stand across the street for an unreasonable time;<sup>6</sup>

<sup>1</sup>*Post* Chapter XXVI. See, also, *Mathews v. Kelsey*, 58 Me. 56, S. C. 4 Am. Rep. 248; *Mallory v. Griffey*, 85 Pa. St. 275; *Jochem v. Robinson*, 66 Wis. 638, S. C. 57 Am. Rep. 298; *Welsh v. Wilson*, 101 N. Y. 254; 1 Hawk P. C. Ch. 76, section 49; *Judd v. Fargo*, 107 Mass. 267; *People v. Horton*, 64 N. Y. 620; *Haight v. Keokuk*, 4 Ia. 199; *Cohen v. New York*, 113 N. Y. 532, S. C. 10 Am. St. R. 506; *Callanan v. Gilman*, 107 N. Y. 360, S. C. 1 Am. St. R. 831; *Davis v. Mayor*, 14 N. Y. 506, S. C. 67 Am. Dec. 186; *King v. Russell*, 7 East, 427.

<sup>2</sup>*Callanan v. Gilman*, 107 N. Y. 360, S. C. 1 Am. St. Rep. 831, and note; *Cohen v. Mayor*, 113 N. Y. 532; *Jochem v. Robinson*, 66 Wis. 638; *Rex v. Russell*, 6 East, 427; *Fritz v. Hobson*, 42 L. T. (N. S.) 225; *Palmer v. Silverthorn*, 32 Pa. St. 65.

<sup>3</sup>*Com. v. Passmore*, 1 Serg. & R. 219; *Com. v. Ruggles*, 6 Allen, 588; *Lavery v. Hannigan*, 52 N. Y. Super. Ct. 463.

<sup>4</sup>*People v. Cunningham*, 1 Denio, 524, S. C. 43 Am. Dec. 709; *King v. Moore*, 3 Barn. & Adol. 184; *Dennis v. Sipperly*, 17 Hun. 69; *Rex v. Carlisle*, 6 Carr. & P. 636.

<sup>5</sup>*Rex v. Cross*, 3 Campb. 226; *Turner v. Holtzman*, 54 Md. 148, S. C. 39 Am. Rep. 361; *Branahan v. Hotel Co.*, 39 Ohio St. 333, S. C. 48 Am. Rep. 457. And see *State v. Edens*, 85 N. C. 522. A reasonable necessity will, however, justify a temporary occupancy of a street. *Jochem v. Robinson*, 72 Wis. 199, S. C. 39 N. W. R. 383.

<sup>6</sup>*Rauch v. Lloyd*, 31 Pa. St. 358, S. C. 72 Am. Dec. 747; *Murray v. South Car. R. R. Co.*, 10 Rich. 227, S. C. 70 Am. Dec. 219.

nor to use the street as a freight yard;<sup>1</sup> nor to leave hand-cars at the side of a highway.<sup>2</sup>

An act may also be a nuisance because it interferes with public travel, although it does not of itself constitute an obstruction in a highway. Thus, it has been held a nuisance to carry an unreasonable weight on a highway with an unusual number of horses,<sup>3</sup> or to drive ahead of a person purposely crossing and recrossing in front of him, and stopping in such a manner as to obstruct his passage.<sup>4</sup> So, one who collects a noisy and disorderly crowd in a public street, by music or by speaking, may be guilty of creating a nuisance;<sup>5</sup> and so may a constable who conducts an execution sale in a street.<sup>6</sup> The use of steam as a motor for street cars has also been held to be a nuisance *per se* under a city ordinance prohibiting the same,<sup>7</sup> but in another case it was held that the use of a steam traction engine upon the streets of a city is not necessarily a nuisance.<sup>8</sup> An object

<sup>1</sup> Gahagan v. Boston, etc., R. R. Co., 1 Allen, 187, S. C. 79 Am. Dec. 724.

<sup>2</sup> Vars v. Grand Trunk Ry. Co., 23 Upper Can. C. P. 143; Brownell v. Troy, etc., R. R. Co., 55 Vt. 218.

<sup>3</sup> Rex v. Edgerly, 3 Salk. 183. See, also, Reg. v. Chittenden, 49 J. P. 503.

<sup>4</sup> 1 Add. Torts, section 234; Green v. Lond. Gen. Omnib. Co., 7 C. B. N. S. 290. See, also, Com. v. Temple, 14 Gray, 69.

<sup>5</sup> Rex v. Moore, 3 B. & Ald. 184; Barker v. Com., 19 Pa. St. 412; Att'y General v. Sheffield, etc., Co., 19 Eng. L. & Eq. 649; State v. White, 64 N. H. 48. Compare Matter of Frazee, 63 Mich. 396, S. C. 6 Am. St. Rep. 310; State v. Hughes, 72 N. C. 25; Anderson v. Wellington, 40 Kan. 173, S. C. 10 Am. St. Rep. 175. A procession of seven members of the Salvation Army is not necessarily a nuisance. People v. Rochester, 44 Hun. 166.

<sup>6</sup> Com. v. Milliman, 13 Serg. & R. 403.

<sup>7</sup> North Chicago, etc., Ry. Co. v. Lake View, 105 Ill. 207, S. C. 2 Am. & Eng. Corp. Cas. 6. See, also, Smith v. Stokes, 4 B. & S. 84; Harrison v. Lea-

fer, 5 L. T. (N. S.) 640; Watkins v. Reddin, 2 F. & F. 629; Reg. v. Chittenden, 49 J. P. 503.

<sup>8</sup> Macomber v. Nichols, 34 Mich. 212, S. C. 22 Am. Rep. 522. In this case, Cooley, C. J., says: "When the highway is not restricted in its dedication to some particular mode of use, it is open to all suitable methods; and it can not be assumed that these will be the same from age to age, or that new means of making the way useful must be excluded merely because their introduction may tend to the inconvenience or even to the injury of those who continue to use the road after the same manner as formerly. A highway established for the general benefit of passage and traffic must admit of new methods of use whenever it is found that the general benefit requires them; and if the law should preclude the adaptation of the use to the new methods, it would defeat, in a greater or less degree, the purposes for which highways are established." See, also, Wabash, etc., R. R. Co. v. Farver, 111 Ind. 195.

at the side of a highway, or in close proximity thereto, of such a character that it is naturally calculated to frighten horses of ordinary gentleness, may constitute a nuisance.<sup>1</sup> Thus, where a steam roller, which had been used in repairing a street, was left by the wayside over Sunday so that it frightened the plaintiff's horse, it was held to be a nuisance;<sup>2</sup> and where a railroad company erected a derrick upon its own premises in such a manner that the arm swung over the highway, thereby frightening the plaintiff's horse, the company was held liable for all damages so caused, upon the ground that it was guilty of maintaining a nuisance.<sup>3</sup>

Any unauthorized interference with a highway, by an individual, to change its grade or course, is a nuisance, even though it may be improved thereby and rendered more convenient for travel.<sup>4</sup> So, an unauthorized opening or coal hole left uncovered in a sidewalk so as to make travel thereon dangerous, is a nuisance;<sup>5</sup> and any unauthorized and unguarded excavation within or near a highway, by which persons in the lawful use of the way are liable to be injured, will generally be deemed a nuisance.<sup>6</sup> Highways may not, in the absence of some statutory provision, be used as a pasture ground for cattle, sheep, or

<sup>1</sup> Cooley on Torts, 617. Citing *Cook v. Charlestown*, 98 Mass. 80; *Kingsbury v. Dedham*, 13 Allen, 186; *Horton v. Taunton*, 97 Mass. 266; *Foshay v. Glen Haven*, 25 Wis. 288; *Ayer v. Norwich*, 39 Conn. 376, S. C. 12 Am. Rep. 396; *Morse v. Richmond*, 41 Vt. 435. See, also, *House v. Metcalf*, 27 Conn. 631; *Judd v. Fargo*, 107 Mass. 264; *Wilkins v. Day*, 20 L. R. Q. B. Div. 110. Compare *Harlow v. Humiston*, 6 Cow. 189; *W. St. L. & P. R. R. Co. v. Farver*, 111 Ind. 196.

<sup>2</sup> *Young v. New Haven*, 39 Conn. 435.

<sup>3</sup> *Jones v. Railroad Co.*, 107 Mass. 261. See, generally, as to the duty of railroad companies. *State v. Chicago, etc., Co. (Ia.)*, 42 N. W. R. 365; *Caldwell v. Vicksburg, etc., Co. (La.)*, 6 So.

*R.* 217; *Kyne v. Wilmington, etc., Co. (Del.)*, 14 Atl. R. 922.

<sup>4</sup> *Hunt v. Rich*, 38 Me. 195; *Bateman v. Burge*, 6 Car. & P. 391.

<sup>5</sup> *Irvine v. Wood*, 51 N. Y. 234; *Congreve v. Smith*, 18 N. Y. 79; *Congreve v. Morgan*, 18 N. Y. 84; *Severin v. Eddy*, 52 Ill. 189; *Galvin v. New York*, 112 N. Y. 223, S. C. 19 N. E. R. 675. Compare *Dickson v. Hollister*, 123 Pa. St. 421, S. C. 10 Am. Rep. 533.

<sup>6</sup> *Coupland v. Hardingham*, 3 Campb. 398; *Stephani v. Brown*, 40 Ill. 428; *Portland v. Richardson*, 54 Me. 46; *Beatty v. Gilmore*, 16 Pa. St. 463; *Bond v. Smith*, 44 Hun. 219; *Runyon v. Bordine*, 2 Green (N. J.), 472; *Barnes v. Ward*, 9 C. B. 392; *Temperance Hall Ass'n v. Giles*, 33 N. J. L. 260; *Wood on Nuisance*, section 271.



horses,<sup>1</sup> and streets are not intended as a playground for children.<sup>2</sup>

An obstruction which would otherwise constitute a nuisance may be legalized by legislative enactment; for that which the State has authorized can not be a public nuisance.<sup>3</sup> Such statutes, however, are strictly construed,<sup>4</sup> and although one may assume to act under their provisions, yet if he steps beyond the bounds or does an act authorized by the statute in a manner different from that prescribed, the statute will not protect him, and he may become liable for maintaining a nuisance the same as if no such statute existed.<sup>5</sup> The acts that the legislature may authorize, which would otherwise constitute nuisances, are, in general, those which affect public highways, or public streams, in which all the people may be said to have an interest; and such authority exempts only from liability from prosecution or civil action at the instance of the State; it does not affect claims of private citizens for damages on account of special inconvenience or injury not suffered by the public at large.<sup>6</sup>

It may be well to illustrate the general rules we have stated by specific instances of their application. Thus, the power of

<sup>1</sup> *Baldwin v. Ensign*, 49 Conn. 113, S. C. 44 Am. Rep. 205; *Stackpole v. Healy*, 16 Mass. 33, S. C. 8 Am. Dec. 121; *Tonawanda R. R. Co. v. Munger*, 5 Denio, 255, S. C. 49 Am. Dec. 239.

<sup>2</sup> *Vosburgh v. Moak*, 1 Cush. 453, S. C. 48 Am. Dec. 613.

<sup>3</sup> *Cooley on Torts*, 615; *First Baptist Church v. Utica*, etc., R. R. Co., 6 Barb. 313; *Com. v. Capp*, 48 Pa. St. 53; *City of North Vernon v. Voegler*, 103 Ind. 314, 327; *Perry v. New Orleans*, etc., Co., 55 Ala. 413; *Detroit v. Detroit*, etc., Co., 37 Mich. 558; *Cushing v. Boston*, 128 Mass. 330; *Sawyer v. Davis*, 136 Mass. 239.

<sup>4</sup> See *Jersey City v. N. J. Cent. R. R. Co.*, 40 N. J. Eq. 417, S. C. 2 Atl. Rep. 262; *Newark v. Dela.*, etc., R. R. Co., 42 N. J. Eq. 196, S. C. 5 Cent. Rep. 630; *Penna. R. R. Co. v. Mish (Pa.)*, 4 Cent.

Rep. 279; *Cogswell v. N. Y.*, etc., R. R. Co., 103 N. Y. 10; *Stormfeltz v. Turnp. Co.*, 13 Pa. St. 555; *Hughes v. Railroad Co.*, 2 R. I. 493.

<sup>5</sup> *Com. v. Nashua*, etc., R. R. Co., 2 Gray, 54; *Rex v. Morris*, 1 B. & Ad. 441; *Randle v. Pac. R. R. Co.*, 65 Mo. 325; *Louisville*, etc., R. R. Co. v. *Com.*, 13 Bush. (Ky.) 388; *Wood on Nuisance*, section 757; *Queen v. Bradford Nav. Co.*, 6 Best. & S. 649; *Little Miami*, etc., R. R. Co. v. *Comm'rs*, 31 Ohio St. 338; *King v. Morris*, etc., R. R. Co., 18 N. J. Eq. 397; *Com. v. Railroad Co.*, 27 Pa. St. 339.

<sup>6</sup> *Baltimore*, etc., R. R. Co. v. *Fifth Baptist Church*, 108 U. S. 317; *Penna. R. R. Co. v. Angel*, 41 N. J. Eq. 316, S. C. 7 Atl. Rep. 432, S. C. 56 Am. Rep. 1, 5; *Sullivan v. Royer*, 72 Cal. 248, S. C. 1 Am. St. Rep. 51.

the legislature to authorize obstructions is shown in those cases in which it is held that railroad companies may be given the right to lay their tracks upon a city street;<sup>1</sup> that a navigable stream may be bridged,<sup>2</sup> and navigation companies given special privileges therein;<sup>3</sup> that sewers and drains may be constructed, or gas and water pipes laid in the streets under the authority conferred upon cities;<sup>4</sup> and that steps may be permitted to extend into the street where they are authorized by the legislature.<sup>5</sup> The same cases, and others of a similar nature, show also the limitations of this power. These limitations are fully set forth in our chapter on "The Rights and Remedies of Abutters," yet it may be well to state generally, in this connection, that while the State may restrict its own right, it can not take away or seriously impair individual rights, such as the right of access, by authorizing new and additional burdens or servitudes to be placed upon a highway without awarding to the abutter such compensation as he is entitled to under the constitution.<sup>6</sup>

The power to authorize obstructions may be delegated to municipal corporations,<sup>7</sup> but, in the absence of a provision in its charter or some general law upon the subject, a municipality has no more right to license or maintain a nuisance than an individual would have, and for a nuisance maintained upon its

<sup>1</sup> Danville, etc., *R. R. Co. v. Com.*, 73 Pa. St. 29; *Com. v. Old Colony*, etc., *R. R. Co.*, 14 Gray, 93; *Milburn v. Cedar Rapids*, 12 Ia. 246; *Randle v. Pac. R. R. Co.*, 65 Mo. 325; *Williams v. N. Y. Cent. R. R. Co.*, 16 N. Y. 97; *South Car., etc., R. R. Co. v. Steiner*, 44 Ga. 546.

<sup>2</sup> *Arimond v. Green Bay*, etc., *Co.*, 31 Wis. 316; *Lee v. Pembroke Iron Co.*, 57 Me. 481.

<sup>3</sup> *Muskegon Boom Co. v. Evert Boom Co.*, 34 Mich. 462; *People v. Ferry Co.*, 68 N. Y. 71.

<sup>4</sup> *City of Quincy v. Bull*, 106 Ill. 337, S. C. 4 Am. & Eng. Corp. Cas. 554; *Cincinnati v. Penny*, 21 Ohio St. 499, S. C. 8 Am. Rep. 73; *State, ex rel., v. Cincinnati, etc., Co.*, 18 Ohio St. 262; *Indianapolis v. Gas Co.*, 66 Ind. 396;

*Des Moines Gas Co. v. Des Moines*, 44 Ia. 508.

<sup>5</sup> *Cushing v. Boston*, 122 Mass. 173; *Same v. Same*, 128 Mass. 330, S. C. 35 Am. Rep. 383.

<sup>6</sup> *Cooley on Torts*, 616; *Stone v. Fairbury*, etc., *R. R. Co.*, 68 Ill. 394; *Danville, etc., R. R. Co. v. Com.*, 73 Pa. St. 29; *Elizabethtown, etc., R. R. Co. v. Combs*, 10 Bush. (Ky.) 382, S. C. 19 Am. Rep. 67; *Wood v. Stowbridge*, 16 C. B. (N. S.) 222; *Wetmore v. Story*, 22 Barb. 414; *Wood on Nuisance*, sections 759, 762.

<sup>7</sup> *Transportation Co. v. Chicago*, 99 U. S. 635; *Mercer v. Railroad Co.*, 36 Pa. St. 99; *Clarke v. Blackmar*, 47 N. Y. 150; *Brown v. Duplessis*, 14 La. Ann. 842.

own property a city is liable the same as an individual would be.<sup>1</sup> In order to protect the public and promote the health, safety, and general welfare of their inhabitants, it is necessary that cities should be liberally endowed with power to prevent and abate nuisances, and, on this account, the various State legislatures have conferred upon cities very extensive authority over such matters.<sup>2</sup> But a city ordinance declaring a thing to be a nuisance does not necessarily make it one, and the city can not destroy property as a nuisance when, in truth, it is not a nuisance.<sup>3</sup>

The extent of municipal authority over nuisances depends largely, if not entirely, upon the powers granted by the legislature. Authority to preserve the health of the citizens, and the safety of their property is said to be a sufficient foundation upon which to base ordinances for the suppression of whatever is intrinsically and necessarily a nuisance.<sup>4</sup> Where specific authority over certain structures, acts, trades or vocations is granted the extent of that authority is to be measured by the terms of

<sup>1</sup> *Petersburg v. Applegarth*, 28 Gratt. 321; *Hiblett v. Nashville*, 12 Heisk. 684; *Haag v. Co. Com'rs*, 60 Ind. 511; *Harper v. Milwaukee*, 30 Wis. 365; *Judge v. Meriden*, 38 Conn. 90; *Railroad Co. v. Norwalk*, 37 Conn. 109; *Pfau v. Reynolds*, 53 Ill. 212; *St. John v. Mayor*, 3 Bosw. 483; *Morrison v. Hinkson*, 87 Ill. 587; *State v. Dover*, 46 N. H. 452; *Shaubet v. St. Paul, etc.*, R. R. Co., 21 Minn. 502; *Cohen v. Mayor*, 113 N. Y. 532, S. C. 10 Am. St. Rep. 506; *Edmonson v. Moberly* (Mo.), 11 S. W. R. 990; *Hartford County v. Wise* (Md.), 18 Atl. 31. A city is not liable where a rope is stretched across a sidewalk by order of a court. *Belvin v. Richmond* (Va.), 8 S. E. R. 378.

<sup>2</sup> See *Barnes v. Dist. of Columbia*, 91 U. S. 540; *City of Terre Haute v. Turner*, 36 Ind. 522; *Dudley v. Frankfort*, 12 B. Mon. (Ky.) 610; *Philadelphia v. Railroad Co.*, 58 Pa. St. 253; *Sinton v. Asbury*, 41 Cal. 525; *Wipona v. Huff*, 11 Minn. 119.

<sup>3</sup> *Village of Des Plaines v. Poyer*, 123 Ill. 348, S. C. 5 Am. St. Rep. 524; *Tissot v. Great Southern Tel. Co.*, 39 La. Ann. 996, S. C. 4 Am. St. Rep. 248; *Yates v. Milwaukee*, 10 Wall. 497; *Rye v. Peterson*, 45 Tex. 312, S. C. 23 Am. Rep. 608; 1 Dill. Munic. Corp., section 374; *Wood on Nuisance*, section 740.

<sup>4</sup> 1 Dill. Munic. Corp., section 379; *Id.*, sections 141, 144. See, also, *Ferrenbach v. Turner*, 86 Mo. 416, S. C. 56 Am. Rep. 437; *City, etc., Co. v. Savannah*, 77 Ga. 731, S. C. 4 Am. St. R. 106; *St. Louis v. Shoenbusch*, 95 Mo. 618, S. C. 8 S. W. R. 791. The power involved in the enactment of ordinances such as those referred to in the case stated is a branch of the police power, and it is appropriately delegated to local governmental instrumentalities. *Com. v. Plaisted* (Mass.), 19 N. E. R. 224; *Ex parte Byrd*, 84 Ala. 17, S. C. 5 Am. St. R. 328.

the grant.<sup>1</sup> If authority to prevent and remove nuisances is expressly granted, almost the only restriction that can be implied is that it shall be exercised for the public health, safety, and convenience.<sup>2</sup> Where a municipal charter gave a town power "to define and declare what shall be deemed nuisances, and to prevent and abate the same, and provide for the punishment of offenders against any order or ordinance passed concerning the same," it was held that the town authorities were authorized to pass an ordinance declaring the use of steam as a motive power to propel street cars along its streets to be a nuisance, and prohibiting the same under penalty fixed by the ordinance.<sup>3</sup> The court, in the case just cited, recognized the rule that there are many things which are not nuisances and can not be made nuisances by a municipal ordinance; but, "on the other hand," the court proceed to say, "there are many things which courts, without proof, will on the same principle declare nuisances. Such, for instance, would be the digging of a pit, or the erection of a house, or other obstruction, in a public highway; and an ordinance passed by a town or city having, as in the present case, a general power over the subject, declaring such obstructions nuisances, would be valid on its face, and a conviction might probably be had under it, without any extrinsic proof to show that the act complained of was, in fact, a nuisance. In all such cases it is sufficient to show the existence of the fact constituting the nuisance. And so we regard the use of steam in the manner specified in the ordinance, for the purpose of propelling street cars along a public street in a thickly populated town, in the absence of any legislative grant authorizing it to be done. Such a use of steam, under the circumstances stated, is, *per se*, a nuisance."<sup>4</sup> So, where a city charter empowered its council "to make regulations to secure the

<sup>1</sup> Dill. Munic. Corp., section 379; Radecke, 49 Md. 217; St. Paul v. Colter, 12 Minn. 41.  
Cushing v. Boston, 128 Mass. 330, S. C. 35 Am. Rep. 383.

<sup>2</sup> See Dubuque v. Maloney, 9 Ia. 450; Roberts v. Ogle, 30 Ill. 459; White v. Mayor, & Swan. (Tenn.) 364; Salem v. Railroad Co., 98 Mass. 431; Dingley v. Boston, 100 Mass. 544; Baltimore v.

<sup>3</sup> North Chicago, etc., Ry. v. Lake View, 105 Ill. 207, S. C. 2 Am. & Eng. Corp. Cas. 6.

<sup>4</sup> *Per* Mulkey, J., in North Chicago, etc., Ry. Co. v. Lake View, 105 Ill. 207. Compare Macomber v. Nichols, 34 Mich. 212.

general health of the inhabitants and to prevent and remove nuisances; \* \* \* to provide for the inclosing, improving and regulating all public grounds, and for regulating the use of the river and banks thereof, and the commons adjacent thereto," and also gave the city full authority over streets and alleys, it was held that the council had the power to adopt an ordinance directing the city marshal to remove all obstructions from certain highways in the city which prevented free access to river fords, notwithstanding such obstructions were caused by a bridge company whose charter assumed to confer exclusive bridge privileges for five miles up and down the river.<sup>1</sup> Under the general power conferred upon the city of Boston to make "needful and salutary by-laws," an ordinance requiring the tenants, occupants, or owners of premises bordering upon the streets to clear the snow from the sidewalks in front of their property, was held reasonable and valid;<sup>2</sup> and an ordinance compelling railroad companies, whose tracks were placed in the city streets, to water their tracks so as to lay the dust, was held in another case to be authorized by a charter providing that the city should have authority "to make, ordain, and establish such by-laws, ordinances, rules, and regulations as shall appear requisite and necessary for the security, welfare, and convenience of the said city and its inhabitants, and for preserving health, peace, and good government within the limits of the same."<sup>3</sup> It has also been held that the power to make "salutary by-laws," respecting the use of streets, will authorize an ordinance regulating the use of streets for moving buildings,<sup>4</sup> and power to preserve the peace and quiet of a city authorizes an ordinance forbidding "all disorderly shouting and dancing" in the streets, although such conduct may not be in violation of any law of the State.<sup>5</sup>

<sup>1</sup> *Compton v. Waco Bridge Co.*, 62 Allen, 287. *Contra*, *Gridley v. Bloomington*, 88 Ill. 554.  
Tex. 715, S. C. 8 Am. & Eng. Corp. Cas. 388.

<sup>2</sup> *Goddard Petitioner, etc.*, 16 Pick. 731, S. C. 4 Am. St. Rep. 106.

<sup>3</sup> *City, etc., Ry. Co. v. Mayor*, 77 Ga. 504, S. C. 28 Am. Dec. 259; *Kirby v. Day v. Green*, 4 Cush. 433.

*Boylston Market Asso.*, 14 Gray, 249. <sup>4</sup> *Day v. Green*, 4 Cush. 433.  
*See, also, Pedrick v. Bailey*, 12 Gray, <sup>5</sup> *Washington v. Frank*, 1 Jones L. 163; *Union Ry. Co. v. Cambridge*, 11 (N. Car.) 436. As further illustrating the power of cities over obstructions

On the other hand, it has been held that a city ordinance forbidding the working of convicts upon the streets is invalid, notwithstanding the city charter gives its council "power to prevent injury or annoyance within the limits of the corporation from anything dangerous, offensive, or unhealthy, and to cause nuisances to be abated;" and the court refused to grant an injunction at the suit of the city against the lessee of the penitentiary to prevent him from working the convicts upon its streets.<sup>1</sup> In a recent case in New Jersey, it was held that the common council of the city of Trenton had no power to license an individual to lay a private sewer in a public street, or to discharge filth into an open water-course, although its charter authorized it to cause sewers to be constructed in any part of the city, where, in the judgment of the common council, the public good required the same.<sup>2</sup>

A city has no power to enter into a contract not to exercise its legislative authority over streets, when the public good demands that it should act.<sup>3</sup> Such authority is conferred upon municipal corporations for the benefit of the public, and it would be contrary to public policy, as well as against the positive law, to permit a city by contract or by ordinance to deprive itself of the power to perform its public duties.

It is said by Mr. Wood that: "When a municipal corporation has ample power to remove a nuisance which is injurious

and nuisances in, over, or under streets, see *Baker v. Boston*, 12 Pick. 184; *Com. v. Stodder*, 2 Cush. 562; *Jackson v. People*, 9 Mich. 111; *Com. v. Brooks*, 99 Mass. 434; *Randall v. Van Vechten*, 19 Johns. 60; *Philadelphia v. Railroad Co.*, 58 Pa. St. 253; *Milhau v. Sharp*, 15 Barb. 193; *Irvin v. Fowler*, 5 Rob. (N. Y.) 482; *Harvey v. Dewoody*, 18 Ark. 252; *Nelson v. Godfrey*, 12 Ill. 22; *Congreve v. Morgan*, 18 N. Y. 84; *State v. Mobile*, 5 Port. (Ala.) 279; *Flemingsburgh v. Wilson*, 1 Bush. (Ky.) 203.

<sup>1</sup> *Ward v. City of Little Rock*, 41 Ark. 526, S. C. 8 Am. & Eng. Corp. Cas. 397.

<sup>2</sup> *Hutchinson v. State*, 39 N. J. Eq. 569, S. C. 8 Am. & Eng. Corp. Cas. 345.

<sup>3</sup> *Louisville, etc., R. R. Co. v. Louisville*, 8 Bush. (Ky.) 415; *Milhau v. Sharp*, 27 N. Y. 611; *Davis v. Mayor*, 14 N. Y. 506, S. C. 67 Am. Dec. 186, and note; *Goszler v. Georgetown*, 6 Wheat. 593; *City of Indianapolis v. Indianapolis Gas, etc., Co.*, 66 Ind. 396, 405; *City of Peru v. Gleason*, 91 Ind. 566; *City of Oakland v. Carpentier*, 13 Cal. 540; *Gale v. Kalamazoo*, 23 Mich. 344; *Lord v. Oconto*, 47 Wis. 386; *Belcher, etc., Co. v. St. Louis, etc., Co.*, 82 Mo. 121; *1 Dill. Munic. Corp., section 97; Cooley's Const. Lim.* 206, *et seq.*

to the health, endangers the safety, or impairs the convenience of its citizens, \* \* \* it is liable for all the injuries that result from a failure on its part to properly exercise the power possessed by it."<sup>1</sup> There are, undoubtedly, cases in which municipal corporations have been held liable for special injuries caused by obstructions and defects in their streets of such a character that they constituted nuisances;<sup>2</sup> but the general rule is well settled that municipal corporations are not liable for failing to exercise governmental and discretionary powers, and, for this reason, we think that such corporations are not, ordinarily, liable for failing to exercise their power to remove or abate a nuisance, unless they are made responsible therefor by statute or the particular nuisance is one in which they are interested, or over which they have control, in what may be termed their individual capacity as distinguished from that of a governmental instrumentality.<sup>3</sup>

There can be no rightful permanent possession of a public highway for private purposes;<sup>4</sup> and, although a right to maintain a private nuisance may, in some cases, be acquired by prescription, no length of time will render a public nuisance, such as the obstruction of a highway, legal or give the person guilty of maintaining it any right to continue it to the detriment of the public.<sup>5</sup> Each day's continuance of such a nuisance is an indictable offense.<sup>6</sup>

<sup>1</sup> Wood on Nuisance, section 749.

<sup>2</sup> See *Parker v. Macon*, 39 Ga. 725; *Norristown v. Moyer*, 67 Pa. St. 356; *Kiley v. Kansas City*, 69 Mo. 102; *People v. Albany*, 11 Wend. 539.

<sup>3</sup> See *Hill v. Boston*, 122 Mass. 344, S. C. 23 Am. Rep. 332; *Oliver v. Worcester*, 102 Mass. 489; *Griffin v. Mayor*, 9 N. Y. 456, 459, 461; *Cain v. Syracuse*, 95 N. Y. 83; *Davis v. Montgomery*, 51 Ala. 139, S. C. 23 Am. Rep. 545; *Hewison v. New Haven*, 37 Conn. 475, S. C. 9 Am. Rep. 342; *Kiley v. Kansas City*, 87 Mo. 103, S. C. 56 Am. Rep. 443; *City of Anderson v. East*, 117 Ind. 126; *Kistner v. Indianapolis*, 100 Ind. 210; *City of Ft. Worth v. Crawford (Tex.)*, 8 Am. & Eng. Corp. Cas. 406.

<sup>4</sup> *Sims v. Frankfort*, 79 Ind. 447.

<sup>5</sup> *Rex v. Cross*, 3 Camp. 227; *State v. Phipps*, 4 Ind. 515; *Weld v. Hornby*, 7 East, 199; *Rung v. Shoneberger*, 2 Watts (Pa.), 23, S. C. 26 Am. Dec. 95; *Dygert v. Schenck*, 23 Wend. 446; *Mills v. Hall*, 9 Wend. 315; *People v. Cunningham*, 1 Denio, 524, S. C. 43 Am. Dec. 709, and note; *Rhodes v. Whitehead*, 27 Tex. 304.

<sup>6</sup> *Sims v. Frankfort*, 79 Ind. 447, 451. Citing *Com. v. Upton*, 6 Gray. 473; *Taylor v. People*, 6 Park Cr. Rep. 347; *Queen v. Brewster*, 8 Upper Can. C. P. 208; *Cross v. Mayor*, 18 N. J. Eq. 305. See, also, *Ellis v. Am. Academy*, 120 Pa. St. 608, S. C. 6 Am. St. Rep. 739.

It is seldom that the law permits a person to redress his own wrong by his own act without the aid of legal proceedings, but the abatement of a public nuisance, such as the obstruction of a highway, furnishes an instance where one who is specially injured may, within certain limits, "take the law into his own hands." It was formerly held that any one might abate a public nuisance, whether specially injured or not,<sup>1</sup> but the better rule, and the one supported by the weight of modern authority, is that stated by Chief Justice Shaw, as follows: "The true theory of abatement of nuisance is, that an individual citizen may abate a private nuisance injurious to him, when he could also bring an action; and, also, when a common nuisance obstructs his individual right, he may remove it to enable him to enjoy that right, and he can not be called in question for so doing. As in the case of an obstruction across a highway, and an unauthorized bridge over a navigable water-course, if he has occasion to use it, he may remove it by way of abatement. But this would not justify strangers, being inhabitants of other parts of the commonwealth, having no such occasion to use it, to do the same."<sup>2</sup> The reason for permitting this summary action upon the part of an individual is, that a resort to the ordinary legal remedies would take too much time to do him any good, and would, therefore, be inadequate to complete justice. It is also consonant with sound policy, and might, it seems to us, be justified upon a similar principle to that expressed by the maxim "equity discourages multiplicity of actions," for while the individual first prevented from traveling upon the highway by an obstruction therein is pursuing his remedy at law, or while the

<sup>1</sup> *Gates v. Blincoe*, 2 Dana (Ky.), 158, S. C. 26 Am. Dec. 440; *Gunter v. Geary*, 1 Cal. 462; 1 Hawk. P. C. 75, section 12; Bac. Abr., Tit. Nuisance; *Burnham v. Hotchkiss*, 14 Conn. 310, 317; 3 Bl. Com., 6; 1 Bish. Crim. Law (3d ed.), section 704.

<sup>2</sup> *Brown v. Perkins*, 12 Gray, 89, 101. See, also, to same effect, *Mayor of Colchester v. Brooke*, 7 Q. B. 339; *Dines v. Petty*, 15 Q. B. 276; *Fort Plain Bridge Co. v. Smith*, 30 N. Y. 44;

*Goldsmith v. Jones*, 43 Hun. 415; *Bowden v. Lewis*, 13 R. I. 189; *Amoskeag Co. v. Goodale*, 46 N. H. 53; *Earp v. Lee*, 71 Ill. 193; *State v. Paul*, 5 R. I. 185; *Lincoln v. Chadbourne*, 56 Me. 197; *State v. Parrott*, 71 N. C. 311, S. C. 17 Am. Rep. 5; *Cooley on Torts*, 46; *Wood on Nuisance*, sections 732, 740. As to what is a "special injury," such as will justify the abatement of a nuisance, see chapter on Rights and Remedies of Abutters.



prosecutor is taking steps to set the machinery of the criminal law in motion, the obstruction remains, travel is at an end, and many other persons must turn back because of the obstruction, which thus gives rise to the probability, at least, of a multiplicity of actions.<sup>1</sup>

The exceptional nature of this remedy and the danger of creating a disturbance and doing unnecessary injury require that the right to pursue it should not be without its proper limitations and restrictions. Thus, the right can not be exercised under such circumstances that it would involve a breach of the peace;<sup>2</sup> and, in any event, care must be taken to do no more injury than is necessary.<sup>3</sup> Although it may be necessary, in order to abate a nuisance in a highway, to remove materials therefrom, the person abating the nuisance is not, for that reason, justified in converting them to his own use.<sup>4</sup> It is safest, before proceeding to abate a nuisance without resort to law, to give notice to the party responsible therefor,<sup>5</sup> although it seems to us that notice is not essential as to one who has unlawfully obstructed a public highway. The person who creates such a nuisance is guilty of an "act of negligence," and a wrong which he must know<sup>6</sup> will interfere with the rights of travelers

<sup>1</sup> The right of an individual to abate a nuisance by his own act rests on a principle akin to that which justifies a traveler in going upon adjoining land in cases where the highway is found-erous. Nor is the principle which underlies this right very unlike that which sustains the legal right of recaption. But even a broader principle supports it, that of necessity; a principle which excuses one who does an act criminal but for the necessity which excuses it. So far does this doctrine of necessity extend that it will excuse the taking of human life.

<sup>2</sup> *Day v. Day*, 4 Md. 262; *Perry v. Fitzhowe*, 8 Q. B. 757; *Miller v. Burch*, 32 Tex. 208; *Rex v. Rosewell*, 2 Salk. 459; *Cooley on Torts*, 47.

<sup>3</sup> *Roberts v. Rose*, L. R., 1 Ex. 82, S. C. 4 Hurlst. & C. 102; *Arundel v. Mc-*

*Culloch*, 10 Mass. 70; *State v. Moffett*, 1 Greene (Ia.), 247; *Indianapolis v. Miller*, 27 Ind. 394; *Northrop v. Burrows*, 10 Abb. Pr. 365; 1 Bish. Crim. Law (3d ed.), section 704. Nor is this an anomalous doctrine, for, as a general rule, a man can not regain possession of his real property by his own act where there is danger of provoking a breach of the peace, but he must, in such a case, invoke judicial assistance.

<sup>4</sup> 1 Hawk. P. C. 76, section 107. See, also, *Larson v. Furlong*, 50 Wis. 681.

<sup>5</sup> *Cooley on Torts*, 47. See, also, note to *Plumer v. Harper*, 14 Am. Dec. 338.

<sup>6</sup> One who wilfully or negligently obstructs a public way must be held to intend the natural consequences of his act, and a natural consequence of obstructing a traveled way is, that persons having a right to use that way may

so far, perhaps, as to endanger their lives, and to require notice in such a case would be to favor a wrong-doer at the expense of an innocent traveler, who might thus be delayed as much as if he had to resort to a court of law in the first instance.<sup>1</sup> It is not easy to conceive why a traveler should be detained and hindered in the enjoyment of his right when he can himself clear the way by removing the unlawful obstruction, nor is there any principle of natural justice which will support a rule that will enable the wrong-doer to drive the person who is in the right to the expense and annoyance of a lawsuit.<sup>2</sup>

"Indictment," it is said, "is the appropriate remedy both against individuals for positive obstructions and against towns for want of repair."<sup>3</sup> It is not always the only public remedy, for there are cases in which an injunction will lie in favor of the public, but it is the remedy most often pursued. The unlawful obstruction of a highway, being a nuisance at common law, may remain punishable as such, notwithstanding a statute imposing a penalty therefor, and unless it appears to have been the intention of the legislature to exclude the common law punishment, the statutory remedy will be regarded as merely cumulative in its nature.<sup>4</sup> One who maintains and continues a public nuisance is liable to indictment therefor as well as the per-

suffer injury, and one who does an act which he must know will injuriously result can not justly claim a right to notice. The act is wrong *per se* and supplies evidence of the evil intention, and the evil doer must know, as matter of law, that one having a special interest may, of right, remove the unlawful obstruction and make the way safe and convenient for public use.

<sup>1</sup> See *Earl of Lonsdale v. Nelson*, 2 Barn. & Cress. 302, 311.

<sup>2</sup> *State v. Flannagan*, 67 Ind. 140; *City of Indianapolis v. Miller*, 27 Ind. 394.

<sup>3</sup> *Angell on Highways*, section 275; *State v. Eisele*, 37 Minn. 256, S. C. 33 N. W. R. 785. An intentional obstruc-

tion of a street will render an individual liable to indictment, although there be no malice, nor will it be a defense for him to show that the occupancy of the street was necessary to enable him to conduct business. *State v. Chicago, etc., Co.* (Ia.), 42 N. W. R. 365. See, also, *State v. Baltimore, etc., R. R. Co.*, 120 Ind. 298.

<sup>4</sup> See *Renwick v. Morris*, 7 Hill, 575; *State v. Wilkinson*, 2 Vt. 480; *Com. v. King*, 13 Metcf. 115; *State v. Hogg*, 5 Ind. 515. So, an indictment for obstructing a highway, good at common law, will be sustained, although not within the express terms of the statute. *State v. Turner*, 21 Mo. App. 324.

son who created it.<sup>1</sup> It has been held in Iowa that the obstruction of a legally established highway which can not be used because of natural obstacles, is not an indictable nuisance;<sup>2</sup> but this would be a dangerous rule to follow if the obstruction were in a portion of the highway which could otherwise be used, and it has been held in Massachusetts that a town was not justified in failing to repair a road by the fact that the portion which it was bound to repair could not be of any practical use at the time because a bridge with which it connected had been swept away and was not yet rebuilt by those who were bound to maintain it.<sup>3</sup>

It is said by Mr. Bishop that: "Any act performed under circumstances showing a criminal intent," whereby a public highway "is in a perceptible manner obstructed, is indictable as a nuisance."<sup>4</sup> And the person or corporation upon whom the law casts the duty of keeping a highway in repair is generally indictable for the neglect of that duty.<sup>5</sup> The liability of municipal corporations in this respect is, however, so far dependent upon the statutory provisions of the different States that it would be unprofitable to pursue the subject further in this connection.

We endeavored at the commencement of this chapter to show what use of a highway would constitute an unlawful obstruction, and in so doing many cases were referred to and many examples given of obstructions which amounted to indictable nuisances. We shall now confine our attention more particularly to the indictment itself. It is sufficient to describe the highway by its beginning, terminus and course, and if it is within the territorial jurisdiction of the court, an indictment or

<sup>1</sup> *State v. Yarrell*, 12 Ired. 130; *King v. Kerrison*, 3 M. & S. 526; *Rex v. Stoughton*, 2 Saund. 158, 159, note; 1 Hawk. P. C. 76, section 157; *Beckley v. Skroh*, 19 Mo. App. 75.

<sup>2</sup> *State v. Shinkle*, 40 Ia. 131.

<sup>3</sup> *Com. v. Deerfield*, 6 Allen, 449.

<sup>4</sup> 2 Bish. Crim. Law, section 1240; *Wood on Nuisance*, sections 248, 857, and notes.

<sup>5</sup> 1 Russ. on Crimes, 351; 1 Bish.

Crim. Law, sections 537, 538; *Wood on Nuisance*, section 307; *State v. Murfreesboro*, 11 Humph. 217; *Com. v. Newburyport*, 103 Mass. 129; *Bragg v. Bangor*, 51 Me. 532; *Chattanooga v. State*, 5 Sneed. (Tenn.) 578; *Com. v. Hopkinsville*, 7 B. Mon. (Ky.) 38; *State v. Great Works, etc., Co.*, 20 Me. 41; *State v. Gorham*, 37 Me. 451; 2 Dill. Munic. Corp., sections 931, 932.

affidavit charging its obstruction within such jurisdiction will be sufficient without stating its particular location.<sup>1</sup> But in a case where the *termini* were given and the road was described as running "from the township of D. into the town of C.," it was held that as the obstruction was in the township of D. there could be no conviction under the indictment.<sup>2</sup> The general character and location of the obstruction, at least, ought to be described,<sup>3</sup> and if this is properly done it will not, in all cases, be necessary to state the *termini* of the road.<sup>4</sup> In an indictment for non-repair of a highway, it is sufficient to allege generally that it is a public highway, without stating how it became so,<sup>5</sup> and it is not necessary to name the owners of the land over which it is laid.<sup>6</sup> A misdescription which causes no ambiguity as to the road intended will not vitiate the indictment.<sup>7</sup> It is no defence to a prosecution for obstructing a highway that the defendant had opened another way over his own land, upon which the public might pass with equal safety and convenience.<sup>8</sup>

In addition to the ordinary remedies by indictment and abatement, courts of equity will often take jurisdiction of a public nuisance, such as the unlawful obstruction of a highway, and restrain or enjoin acts prejudicial to the interests of the com-

<sup>1</sup> *State v. Buxton*, 31 Ind. 67; *Palatka, etc., R. R. Co. v. State*, 23 Fla. 546, S. C. 11 Am. St. Rep. 395. See, also, *State v. Sneed*, 16 Lea. (Tenn.) 450. Such a description as will identify the way and distinguish it from others is sufficient. *Nichols v. State*, 89 Ind. 298; *State v. Stewart*, 66 Ind. 555.

<sup>2</sup> *Reg. v. Botfield*, 1 Carr. & M. 151; *Reg. v. Fisher*, 8 C. & P. 612.

<sup>3</sup> See *State v. Baker*, 58 Ind. 417; *State v. McKay*, 20 Mo. App. 149; *State v. Sturdivant*, 21 Me. 9; *Reg. v. Fisher*, 8 C. & P. 612; Wood on Nuisance, section 857. As a road district may contain several roads, an indictment for obstructing a public road in a

certain district must designate the particular road. *State v. Withrow*, 47 Ark. 551.

<sup>4</sup> *Rouse v. Bardin*, 1 H. Bl. 351; *Rex v. St. Leonards*, 6 C. & P. 582; *Com. v. Newbury*, 2 Pick. 51.

<sup>5</sup> *State v. Harsh*, 6 Black. 346, S. C. 2 Saund. 158, note; *Reg. v. Turweston*, 1 Eng. L. & Eq. 317; *Nichols v. State*, 89 Ind. 298.

<sup>6</sup> *State v. Dover*, 10 N. H. 394.

<sup>7</sup> *Harrow v. State*, 1 Ia. 439; *Alexander v. State*, 16 Ala. 661; *State v. Fletcher*, 13 Vt. 124; *State v. Lemay*, 13 Ark. 405.

<sup>8</sup> See *Weathered v. Bray*, 7 Ind. 706; *Com. v. Belding*, 13 Metcf. 10; *State v. Harden*, 11 S. Car. 360.

munity, at the suit of the attorney general.<sup>1</sup> The jurisdiction of courts of equity in such cases and in cases of purpresture generally, is founded upon the greater promptitude and efficacy of the remedy at their command, as well as the desirability of preventing irreparable mischief and vexatious litigation.<sup>2</sup> Courts of equity, however, are loath to interfere in such matters, and the fact that the obstruction constitutes a nuisance must be clearly shown.<sup>3</sup> If the public owns the fee as well as the easement the application for equitable relief will be more favorably received.<sup>4</sup> But the liability of a town or city to pay damages for injuries caused by the obstruction is a sufficient interest to entitle the town or city to maintain a suit in equity to enjoin an obstruction which constitutes a nuisance, although it does not own the fee.<sup>5</sup>

In addition to the right of the public to maintain a suit in equity for an injunction, private citizens who are specially injured by an obstruction and interested in preventing its continuance may, upon a proper showing, maintain a suit in equity for an injunction.<sup>6</sup> But unless a special injury is shown, the plaintiff will not be entitled to an injunction.<sup>7</sup> It has also been held

<sup>1</sup> *Sparhawk v. Union, etc., R. R. Co.*, 54 Pa. St. 401; *Manhattan, etc., Co. v. Barker*, 7 Robt. (N. Y.) 523; *Att'y Gen. v. Vanderbilt*, 26 N. Y. 287; *Att'y General v. Richards*, 2 Anstr. 603; *Newark, etc., Board v. Passaic (N. J.)*, 18 Atl. Rep. 106; *Att'y Gen. v. Burrige*, 10 Price, 350, 378; 2 *Story's Eq. Jur.*, section 921.

<sup>2</sup> 2 *Story's Eq. Jur.*, section 924; *Att'y Gen. v. Johnson*, 2 Wils. Ch. 87; *Columbus v. Jaques*, 30 Ga. 506; *Silliman v. Hudson River Bridge Co.*, 4 Blatchf. (U. S.) 74; *City of Demopolis v. Webb (Ala.)*, 6 So. Rep. 408.

<sup>3</sup> *Att'y Gen. v. Cleaver*, 18 Ves. 217; *Earl of Ripon v. Hobart*, 3 Milne & K. 169; *Att'y Gen. v. Utica Ins. Co.*, 2 Johns. Ch. 370; *Att'y Gen. v. N. J., etc., Co.*, 2 Green, 136; *Pavonia Land Ass'n v. Temfer (N. J.)*, 7 Atl. 423.

<sup>4</sup> *Att'y Gen. v. Cohoes Co.*, 6 Paige,

133; *Waltz v. Foster*, 12 Ore. 247; *Story's Eq. Jur.*, sections 921, 922.

<sup>5</sup> *Town of Burlington v. Schwarzman*, 52 Conn. 181, S. C. 52 Am. Rep. 571; *City of New Haven v. Sargent*, 38 Conn. 50; *Newark v. Delaware, etc., R. R. Co.*, 42 N. J. Eq. 196; *Mayor, etc., v. Bolt*, 5 Ves. 129; *Trustees of Watertown v. Cowen*, 4 Paige, 510; *Cheek v. City of Aurora*, 92 Ind. 107; *High Inj.*, section 755. Compare *Milwaukee v. Milwaukee, etc., Co.*, 7 Wis. 85.

<sup>6</sup> *Craig v. People*, 47 Ill. 487; *Praet v. Lewis*, 39 Mich. 7; *Conrad v. Smith*, 32 Mich. 429; *Corning v. Lowerre*, 6 Johns. Ch. 439; *Pettebone v. Hamilton*, 40 Wis. 402; *Keystone Bridge Co. v. Summers*, 13 W. Va. 476; *Keizer v. Lovett*, 85 Ind. 240.

<sup>7</sup> *McCowan v. Whitesides*, 31 Ind. 235; *Dwenger v. Chicago, etc., R. R.*

that the injury must be irreparable, or at least not capable of full and complete compensation in damages.<sup>1</sup> This is no doubt a fair statement of the general rule, but the phrase "irreparable injury," is apt to mislead. It does not necessarily mean, as used in the law of injunctions, that the injury is beyond the possibility of compensation in damages, nor that it must be very great.<sup>2</sup> And the fact that no actual damages can be proved, so that in an action at law the jury could award nominal damages only, often furnishes the very best reason why a court of equity should interfere in cases where the nuisance is a continuous one.<sup>3</sup> If the nuisance is merely temporary in its nature and there is no danger that it will affect any substantial rights of the complainant in such a manner that he can not be compensated therefor in damages, courts of equity will generally refuse to interfere;<sup>4</sup> but if the nuisance is a continuing one invading substantial rights of the complainant in such a manner that he would thereby lose such rights entirely but for

Co., 98 Ind. 153; *Harvard College v. Stearns*, 15 Gray, 1; *Shed v. Hawthorne*, 3 Neb. 179; *Crowley v. Davis*, 63 Cal. 460; *Bigelow v. Hartford Bridge Co.*, 14 Conn. 565; *Cumberland, etc., R. R. Co.'s Appeal*, 62 Pa. St. 218; *Moses v. Pittsburgh, etc., R. R. Co.*, 21 Ill. 522; *Truesdale v. Peoria Grape Sugar Co.*, 101 Ill. 561; *Coast Line, etc., R. R. Co. v. Cohen*, 50 Ga. 451.

<sup>1</sup>*Fort v. Groves*, 29 Md. 188; *Bigelow v. Hartford Bridge Co.*, 14 Conn. 565; *Bunnell's Appeal*, 69 Pa. St. 59; *High on Inj.*, section 762. As to what is meant by "irreparable injury," see note to *Dudley v. Hurst*, 1 Am. St. Rep. 368, 374, *et seq.*

<sup>2</sup>*Wood v. Sutcliffe*, 2 Sim. (N. S.) 165; *Casebeer v. Mowrey*, 55 Pa. St. 419; *Wood on Nuisance*, section 778.

<sup>3</sup>This is well explained by Lord Justice Mellish, in the case of *Clowes v. Staffordshire, etc., Co.*, L. R., 8 Ch. App. 125. After stating that nominal damages only can be recovered in the first action, he says: "Then you must

bring a second action, and what you would get in the second action would be the actual damage which you had sustained between the bringing of the first action and the second. Then you would bring a third action with the same result. It is because it is most inconvenient to leave the rights of parties to be determined in that way, and because it is in fact impossible to leave them in that way, that this court has always in such cases given relief." See, also, *Wilts, etc., Co. v. Swindon, etc., Co.*, L. R., 9 Ch. App. 451; *Webb v. Portland Mfg. Co.*, 3 Sum. (U. S.) 189; *Jerome v. Ross*, 7 Johns. Ch. 315; *Babcock v. N. J. Stock Co.*, 20 N. J. Eq. 296; *Pike Co. v. Plankroad Co.*, 11 Ga. 246; *People v. Third Ave. R. R. Co.*, 45 Barb. 63.

<sup>4</sup>*Huckenstine's Appeal*, 70 Pa. St. 102, S. C. 10 Am. Rep. 669; *Wolcott v. Mellick*, 11 N. J. Eq. 204; *Coe v. Lake Co.*, 37 N. H. 254; *Carpenter v. Cummings*, 2 Phila. 74.

the assistance of a court of equity, he will be entitled to an injunction, upon a proper showing, notwithstanding the fact that he might recover some damages in an action at law.<sup>1</sup>

The following adjudged cases will show under what circumstances injunctions have been granted: Where the charter of a railroad company required it to construct and keep in repair good and sufficient bridges at highway crossings so that travel thereon should not be impeded, an injunction was granted at the suit of the mayor and common council of the city of Newark, which was charged with the duty of keeping its streets safe and convenient for travel, to prevent the company from laying four additional tracks at a crossing, making nine in all, in such a manner as to make the crossing extremely dangerous to travelers upon the highway.<sup>2</sup> And in another case, decided by the same court, it was stated as a general rule, that a city which has, by law, the control and supervision of the public highways within its territorial limits, may maintain a suit in equity to prevent any alteration of the highways or injury to them which will deprive the public of their safe and convenient use.<sup>3</sup> So where a railroad company used a public street for a terminal yard in such a manner that it became a nuisance to the owners of neighboring dwellings, it was held that such owners were entitled to an injunction, although the use was authorized by the legislature and was necessary to the business of the company;<sup>4</sup> and a like ruling was made by the New York Court of Appeals in a similar case.<sup>5</sup> So, in another case, it was held that the use by hucksters of portions of certain streets and sidewalks in front of the complainant's dwelling as a market place, by permission

<sup>1</sup> *Corning v. Troy Nail Co.*, 34 Barb. 485, S. C. 40 N. Y. 191; *Wright v. Moore*, 38 Ala. 593; *Goodson v. Richardson*, L. R. 9 Ch. App. 221; *Webb v. Portland Mfg. Co.*, 3 Sum. (U. S.) 189; *Davis v. Londgreen*, 8 Neb. 43; *Georgia Chemical Co. v. Colquitt*, 72 Ga. 172.

<sup>2</sup> *Mayor, etc., v. Delaware, etc., R. R. Co.*, 42 N. J. Eq. 196, S. C. 7 Atl. Rep. 123. See, also, *Newark, etc., R. R. Co. v. Newark*, 23 N. J. Eq. 522.

<sup>3</sup> *Mayor, etc., v. Central R. R. Co.*, 40 N. J. Eq. 417, S. C. 2 Atl. Rep. 262. Upon the same principle a township was granted an injunction to restrain the erection of weigh-scales upon a public road. *Huddleston v. Killbuck Tp. (Pa.)*, 7 Atl. Rep. 210.

<sup>4</sup> *Penna. R. R. Co. v. Angel*, 41 N. J. Eq. 316, S. C. 56 Am. Rep. 1.

<sup>5</sup> *Cogswell v. New York, etc., R. R. Co.*, 103 N. Y. 10.

of the city on payment of a license fee, constituted not only a public nuisance, but also a private nuisance as to the complainants, and that they were entitled to an injunction against the city;<sup>1</sup> and where a city ordinance set apart a portion of a street in front of the plaintiff's premises as a hackney-coach stand, an injunction was granted against the persons using the same.<sup>2</sup> In yet another case a telephone company was compelled by mandatory injunction, at the suit of an adjoining land owner, to remove its poles from the street in front of his premises, and was prohibited from erecting others, without his consent, notwithstanding it had the consent of the public road board to set its poles in that place.<sup>3</sup> So, where water pipes had been laid in the soil of a highway, without the consent of the owner of the fee, an injunction was granted at his suit to restrain the continuance of the nuisance.<sup>4</sup> In this country, however, an injunction would probably be refused to restrain such a use of a city street, although it might be granted in case of a rural road. The illustrations we have given are, most of them, cases in which the plaintiff's right of access was impaired without the payment of compensation therefor, but an injunction may also be granted at the suit of any one else who suffers special and irreparable injury from the obstruction of a highway, or whose substantial rights are invaded by a continuous nuisance, which would otherwise require repeated actions at law upon his part in order to prevent the entire loss of such right.<sup>5</sup>

On the other hand, it has been held that a telegraph company will not be restrained from erecting poles in a street at the suit of an abutter, where the right to do so is unsettled and no emergency or irreparable damage is shown.<sup>6</sup> So, where a building was erected upon land designated on a plat as a pub-

<sup>1</sup> *McDonald v. Newark*, 42 N. J. Eq. 136, S. C. 7 Atl. Rep. 855. See, also, *St. John v. Mayor*, 3 Bosw. (N. Y.), 483.

<sup>2</sup> *Branahan v. Hotel Co.*, 39 Ohio St. 333, S. C. 48 Am. Rep. 457.

<sup>3</sup> *Broome v. New Jersey, etc., Tel. Co.* (N. J.), 7 Atl. Rep. 851.

<sup>4</sup> *Goodson v. Richardson*, L. R. 9 Ch. 221.

<sup>5</sup> *De Witt v. Van Schoyk*, 110 N. Y. 7, S. C. 6 Am. St. Rep. 342; *Chapman v. Rochester*, 110 N. Y. 273, S. C. 6 Am. St. Rep. 366; *Butler v. Thomasville*, 74 Ga. 570.

<sup>6</sup> *Roake v. Am. Tel. Co.*, 41 N. J. Eq. 35, S. C. 3 Cent. Rep. 73; *Hewett v. Western Union Tel. Co.*, 4 Mackey, 424, S. C. 2 Cent. Rep. 694.



lic street, an injunction was refused upon the ground that it did not appear that the land had ever been used or accepted by the public as a street.<sup>1</sup> In another case, an injunction to restrain the closing of a way was refused because it was shown that the plaintiff had an equally available means of access by another road, a few rods distant, which he used every day.<sup>2</sup> But this decision seems questionable.<sup>3</sup>

Several persons may unite as plaintiffs to restrain or enjoin a public nuisance which is common to all and from which they suffer a peculiar injury different from that of the general public.<sup>4</sup> The bill or complaint for injunction, especially where it is brought to restrain a threatened nuisance, should state facts clearly showing the character of the nuisance and the character of the injury, so that the court may see that it will, if permitted to exist, cause special injury to the plaintiff of such a nature as to require the interference of a court of equity in order to do him justice and protect his rights.<sup>5</sup>

As a general rule, no person can maintain an action for damages from a common nuisance where the injury and damages are common to all.<sup>6</sup> But if a person sustains a special damage, peculiar to himself, from the obstruction of a highway, whether it be to his person or his property, he may maintain an action therefor.<sup>7</sup> Thus, obstructing and cutting off the access to a per-

<sup>1</sup> *Pavonia Land Asso. v. Temfer* (N. J.), 7 Atl. Rep. 423.

<sup>2</sup> *Sargent v. George*, 56 Vt. 627.

<sup>3</sup> See *De Witt v. Van Schoyk*, 110 N. Y. 7, S. C. 6 Am. St. Rep. 342; *Weathered v. Bray*, 7 Ind. 706.

<sup>4</sup> *Atchison, etc., R. R. Co. v. Nave*, 38 Kan. 744, S. C. 5 Am. St. Rep. 800; *Palmer v. Waddell*, 22 Kan. 352; *Peck v. Elder*, 3 Sandf. (N. Y.) 126; *Barnes v. Racine*, 4 Wis. 466; *Town of Sullivan v. Phillips*, 110 Ind. 320. See generally, as to parties plaintiff and defendant, note to *Tate v. Ohio, etc., R. R. Co.*, 71 Am. Dec. 311, 315. Compare, *Hinchman v. R. R. Co.*, 17 N. J. Eq. 75.

<sup>5</sup> See *Adams v. Michael*, 38 Md. 125;

*Hinchman v. Patterson Horse R. R. Co.*, 17 N. J. Eq. 75; *Thebaut v. Canova*, 11 Fla. 143; *Imperial Gas Co. v. Broadbent*, 7 H. L. Cas. 600; *Haines v. Taylor*, 10 Beav. 75; *Kingsbury v. Flowers*, 65 Ala. 486; *Roman v. Strauss*, 10 Md. 89.

<sup>6</sup> *Coke's Inst.*, 56a; *William's Case*, 5 Coke, 72; *Pain v. Patrick*, 3 Mod. 282; *Lansing v. Smith*, 8 Cow. 152. See, also, *Iveson v. Moore*, 1 Ld. Raym. 486; *Greasly v. Codling*, 2 Bing. 263; *Pierce v. Dart*, 7 Cow. 609.

<sup>7</sup> *Iveson v. Moore*, 1 Ld. Raym. 186; *Robert Mary's Case*, 9 Coke, 112; *Pain v. Patrick*, 3 Mod. 289; *Hart v. Bassett*, 1 T. Jones, 156; *Chichester v. Lethbridge*, Willes, 71; *Brown v.*

son's place of business is a special injury, for which he may recover damages in an action at law;<sup>1</sup> and ejectment or trespass will lie against one who wrongfully places an obstruction of a permanent character upon that part of a highway in which the complainant owns the fee.<sup>2</sup> So, if the complainant, by reason of an obstruction in a highway, is compelled to turn back or go a more circuitous route, whereby he is specially damaged by being rendered unable to perform a contract, he may maintain an action therefor;<sup>3</sup> and the same is true if, by reason of such an obstruction, he sustains peculiar damage in the labor of himself and his servants to remove the obstruction.<sup>4</sup> So, where an obstruction wrongfully placed by a third person in a highway causes travelers to pass around it over the adjoining land, whereby the crops of the land owner are injured, the latter may have his action against the person creating the obstruction.<sup>5</sup> But mere delay caused by an obstruction, unaccompanied by special injury, does not, as a rule, give any right to an action for special damages.<sup>6</sup>

Watson, 47 Me. 161; *Clark v. Peckham*, 10 R. I. 35; *Dudley v. Kennedy*, 63 Me. 465; *Stetson v. Faxon*, 19 Pick. 147, S. C. 31 Am. Dec. 123, and note.

<sup>1</sup> *Shephard v. Barnett*, 52 Tex. 638; *Enos v. Hamilton*, 27 Wis. 256; *Wilkes v. Hungerford Market Co.*, 2 Bing. (N. C.) 281; *Williams v. Tripp*, 11 R. I. 447; *Garitee v. Baltimore*, 53 Md. 422; *Stetson v. Faxon*, 19 Pick. 147, S. C. 31 Am. Dec. 123; *Venard v. Cross*, 8 Kan. 248. Compare *Adam v. Schalenberger*, 41 Cal. 449.

<sup>2</sup> Wood on Nuisance, section 697; *Perley v. Chandler*, 6 Mass. 454; *Hunt v. Rich*, 38 Me. 195; *Adams v. Rivers*, 11 Barb. 395; *State v. Davis*, 80 N. C. 351; *Kelk v. Pearson*, L. R., 6 Ch. App. 809.

<sup>3</sup> *Lansing v. Smith*, 8 Cow. 152; *Greasley v. Codling*, 2 Bing. 263; *Hart v. Bassett*, T. Jones, 156; *Milarkey v. Foster*, 6 Ore. 378.

<sup>4</sup> *Rose v. Miles*, 4 M. & S. 101, *Pierce v. Dart*, 7 Cow. 609; *Hughes v. Heiser*, 1 Binn. (Pa.) 463; *Chichester v. Lethbridge*, Willes, 71; *Lansing v. Wiswall*, 5 Denio, 213.

<sup>5</sup> *Maynell v. Saltmarsh*, 1 Keble, 847.

<sup>6</sup> *Pain v. Patrick*, 3 Mod. 289; *Shaubut v. St. Paul, etc., R. R. Co.*, 21 Minn. 502; *Houck v. Wachter*, 34 Md. 265, S. C. 6 Am. Rep. 332; *Sohn v. Cambern*, 106 Ind. 302; *Powell v. Bunger*, 91 Ind. 64. See, also, *Burton v. Dougherty*, 19 New Brunswick, 51.

## CHAPTER XXV.

### PERSONAL LIABILITY OF HIGHWAY OFFICERS.

There is no difficulty in disposing of the question of the personal liability of highway officers in cases where a liability is sought to be enforced against them by a private individual in matters arising out of contract. The rule upon this subject is well settled, and it may be thus stated: Where it is known that the party is contracting in his capacity as a public officer he is not liable, in the absence of fraud, although the public corporation or the State may not be bound by the contract.<sup>1</sup> There is an essential difference between public officers and private agents, and the reason for the distinction is very clear and very strong; in the one case the nature and scope of the authority assumed can be ascertained from the law and the public records, whereas in the other there is no such opportunity for securing information, so that the person contracting with the officer knows that he acts as an officer and not as an individual. One who deals with a public officer without availing himself of the means of knowledge laid open to him by the law and the public records has no just reason to complain, for it is his own folly not to use the means of information placed before him.<sup>2</sup> It is obvious, therefore, that personal liability exists only where there is some element of fraud or some culpable wrong not arising out of contract.

<sup>1</sup> *McBeath v. Haldimand*, 1 Term R. 534; *Brown v. Rundlett*, 15 N. H. 181; *Gildy v. Lord Palmerston*, 3 B. & B. 286; *Hodgson v. Dexter*, 1 Cranch. 345; *Parks v. Ross*, 11 How. 362; *Sanborn v. Neal*, 4 Minn. 126; *Gill v. Bowen*, 12 John. 385; *People v. Vilas*, 36 N. Y. 459; *Fox v. Drake*, 8 Cow. 191; *Cook v. Erwin*, 10 Sergt. & R. 492; *West v. Jones*, 9 Watts, 27; *Knight v. Clark*, 48 N. J. L. 22, S. C. 57 Am. R. 360; *Boardman v. Haynes*, 29 Ia. 339; *Ogden v. Raymond*, 22 Conn. 379; *Stone v. Huggins*, 28 Vt. 617; *State v. Dunnington*, 12 Md. 340; *Newman v. Sylvester*, 42 Ind. 106.

<sup>2</sup> *Baker v. State*, 27 Ind. 485; *City of Burlington v. Gilbert*, 31 Ia. 356; *Smout v. Ibenny*, 10 M. & W. 1; *Clark v. City of Des Moines*, 19 Ia. 199.

Highway officers are not liable to the corporation that appoints, or elects them, to the same extent that private agents are liable to their principals. They are, of course, liable, where they expressly contract or give bond to faithfully perform their duties, for a wrongful breach of such a contract, and so, too, are they liable when they illegally convert money of the corporation or of the public to their own use. If there is any right of action in the local government for a breach of duty it exists only in cases where there is a want of good faith, for in no event can an action by the local government be maintained where the officer has acted in good faith although he may have erred.<sup>1</sup>

A public officer is only liable to an individual to whom he owes a duty.<sup>2</sup> It is by no means every breach of duty that will enable an individual to maintain an action against an officer. Although the officer may be guilty of a breach of duty subjecting him to a prosecution for a criminal offense, or subjecting him to a civil action by the representatives of the government, he may not be liable to an individual. It by no means follows that because an officer is liable to indictment or to an action by the State that he is liable to an individual. The prime elements of a cause of action by a private citizen are the existence of a duty to the citizen and a special injury resulting to him from a breach of that duty. The law was thus stated in a New York case: "To give a right of action for such a cause, the plaintiff must show that the defendant owed the duty to him personally. Wherever an action is brought for a breach of duty imposed by statute, the party bringing it must show that he had an interest in the performance of the duty and that the duty was imposed for his benefit."<sup>3</sup> But it is not to be inferred that

<sup>1</sup> *Dillon's Munic. Corp.* (3d ed.), section 236. See *Municipality, etc., v. Horseman*, 16 Upper Can. Q. B. 588; *Daniels v. Burford*, 10 Upper Can. Q. B. 478; *Inhabitants v. Fiske*, 8 Cush. 264; *Hancock v. Hazard*, 12 Cush. 112; *Palmer v. Carrol*, 24 N. H. 314; *People v. Lewis*, 7 Johns. 73.

<sup>2</sup> An individual may have such a special interest in the performance of a duty by a public officer as will give him a

right of action, but he can not have a right of action where the only duty shown is a duty in which the individual is interested in common with other members of the community. *Moss v. Cummings*, 44 Mich. 359; *Butler v. Kent*, 19 Johns. 223, S. C. 10 Am. Dec. 219; *Raynsford v. Phelps*, 43 Mich. 342, S. C. 32 Am. R. 189.

<sup>3</sup> *Strong v. Campbell*, 11 Barb. 135. *Shearm. & Redf., Law of Negligence*

one who sues a public officer must produce an express statute, or a direct rule of law, creating a duty for his benefit; it is enough if he shows such facts as enable the courts, by a due application of legal principles, to infer the duty and a special injury from its wrongful breach.<sup>1</sup>

There is an obvious and an important distinction between ministerial and judicial duties as well as between discretionary duties and duties which are of a mandatory or imperative nature. The general rule is, that an officer is not liable for a failure to properly exercise discretionary or judicial duties, but this rule, general as it is, is subject to this essential qualification; a *quasi* judicial officer is liable if he transcends his authority. But as long as he keeps within the scope of the jurisdiction conferred upon him he enjoys an immunity from civil actions.<sup>2</sup> *Quasi* judicial officers may, however, perform ministerial duties, and while engaged in the performance of such duties they may be liable for negligence, for the shield which protected them while acting in a judicial capacity can not be used to protect them while performing ministerial duties.<sup>3</sup> Highway officers charged with the performance of a ministerial duty are, in general, liable for negligently performing it, to one to whom the duty is owing and upon whom they inflict a special injury.<sup>4</sup>

(3d ed.), section 174, state the rule in very similar language. See, also, *State, ex rel., v. Harris*, 89 Ind. 363, S. C. 46 Am. R. 169; *Harrington v. Ward*, 9 Mass. 251; *Fish v. Kelley*, 17 C. B. N. S. 194; *Com. v. Harmer*, 6 Phila. 90; *Robertson v. Fleming*, 4 Macq. Appeal Cases, 167.

<sup>1</sup> *Basset v. Fish*, 75 N. Y. 310; *State v. Haworth (Ind.)*, 23 N. E. R. 946. An individual can not maintain an action unless he shows a special injury to himself resulting from the breach. *Es-lava v. Jones*, 83 Ala. 139; *State v. Harris*, 89 Ind. 363, S. C. 46 Am. Rep. 169; *Compton v. Pruitt*, 88 Ind. 171; *Gardner v. Hearitt*, 3 Denio, 332; *Savings Bank v. Ward*, 100 U. S. 195; *Ware v. Brown*, 2 Bond (U. S. D. C.), 267.

<sup>2</sup> *Edwards v. Ferguson*, 73 Mo. 686; *Yates v. Lansing*, 5 John. 282; *Walker v. Hallock*, 32 Ind. 239; *Tompkins v. Sands*, 8 Wend. 462; *Iilienthal v. Campbell*, 22 La. Ann. 600; *Burnham v. Stevens*, 33 N. H. 247; *Raymond v. Bolles*, 11 Cush. 315; *Apgar v. Hayward*, 110 N. Y. 225, S. C. 18 N. E. R. 85. In *Fath v. Koepfel*, 72 Wis. 289, S. C. 7 Am. St. R. 867, the general doctrine is carried to great lengths.

<sup>3</sup> *Tyler v. Alford*, 38 Me. 530; *Briggs v. Wardwell*, 10 Mass. 356; *Place v. Taylor*, 22 Ohio St. 317; *Fairchild v. Keith*, 29 Ohio St. 156; *Harlow v. Birger*, 30 Ill. 425; *Rowe v. Addison*, 34 N. H. 306.

<sup>4</sup> *County Comm'rs v. Duckett*, 20 Md. 468, S. C. 83 Am. Dec. 557; *Robinson v. Chamberlain*, 34 N. Y. 389, S. C. 90

Where the duties are purely discretionary an officer is not liable to one who suffers an injury from a failure to exercise them, nor is he liable where there is nothing more than a mere error of judgment for an injury caused by the exercise of discretionary duties where he acts in good faith and keeps within the scope of his authority.<sup>1</sup> But where an officer attempts the performance of a ministerial duty which he knows, or which he ought to know, requires peculiar skill and knowledge, he may be liable to one who suffers a special injury because the work is constructed unskillfully and improperly. In such a case the better rule is that stated by an English author, who says: "Public officers, whether their duties are of a general public nature or of a *quasi* public nature (that is, who act upon request of individuals for reward), are liable for negligence, and are not protected merely because they act *bona fide* and to the best of their skill and judgment, but they are bound to conduct themselves in a skillful manner."<sup>2</sup>

It is often quite difficult to determine whether a duty is discretionary or imperative, and no other rule can safely be laid

Am. Dec. 713; *Hover v. Barkhoof*, 44 N. Y. 113; *Henly v. Mayor*, 5 Bing. 91; *Nowell v. Wright*, 3 Allen, 166; *Griffith v. Follett*, 20 Barb. 620; *Robinson v. Rohr*, 73 Wis. 436, S. C. 9 Am. Rep. 810.

<sup>1</sup> *Wilson v. Mayor*, 1 Denio, 599; *Cole v. Medina*, 27 Barb. 218; *Bartlett v. Crozier*, 17 Johns. 449, S. C. 8 Am. Dec. 428; *Conwell v. Emrie*, 4 Ind. 209; *Wilkes v. Dinsman*, 7 How. 89; *Hines v. City of Lockport*, 50 N. Y. 238; *Monk v. New Utrecht*, 104 N. Y. 552; *Cooley on Torts*, 376, 379, 382. Otherwise, if he acts with malice or beyond the scope of his authority. *McOsker v. Burrell*, 55 Ind. 425; *Conwell v. Emrie*, 4 Ind. 209; *Cauble v. Hultz*, 118 Ind. 13; *Turnpike Road v. Champney*, 2 N. H. 199; *Wren v. Walsh*, 57 Wis. 98; *Eslava v. Jones*, 83 Ala. 139, S. C. 3 Am. St. R. 339; *Allen v. Com.*, 83 Va. 94, S. C. 1 S. E. R. 607.

<sup>2</sup> Whittaker's *Smith on Negligence*, 360, citing *Ferguson v. Earl of Kinnoul*, 9 Cl. & F. 251; *Brasyer v. MacLean*, L. R., 66 C. P. 398. This question has been discussed, for it is the controlling question in cases where the injury results from the selection of a defective plan for a public improvement. The rule laid down by the author from whom we have quoted is that which underlies the decisions which declare that officers who undertake work requiring peculiar learning and skill without themselves possessing it or calling to their aid those who do possess it are guilty of actionable negligence. The fundamental wrong in such cases is the undertaking by unskilled or incompetent men of a work which only skilled and competent men can do, for ordinary prudence restrains men from undertaking to do what they lack capacity to do reasonably well and safely.

down than the fundamental one that the nature of the duty is to be determined from the statute creating it.<sup>1</sup> "The character of an act itself," it has been said, "will usually determine whether it be judicial or ministerial. If it be the execution of a determination committed by law to the judgment and discretion of the officer which could be as well done by another as by the one clothed with the power of determination, it is a ministerial act. The fact that it requires skill and involves judgment and discretion will not give it a judicial character."<sup>2</sup>

The current of judicial thought strongly favors the doctrine that authority conferred upon a public officer accompanied with the means of enabling him to exercise it, creates a duty which one who has a special beneficial interest in the performance of the duty may vindicate by a private action.<sup>3</sup> It is generally held that in order to create the duty it is not necessary that mandatory words should be employed, for where the public have an interest, or where third persons have a beneficial interest, the statute will be regarded as creating an imperative duty.<sup>4</sup>

<sup>1</sup> *State v. Haworth* (Ind.), 23 N. E. R. 946.

<sup>2</sup> *McCord v. High*, 24 Ia. 336. In the same case it was said: "The discretion which protects such an officer as the road supervisor, stops at the boundary where the absolute rights of property begin." In *Cubit v. O'Dett*, 51 Mich. 347, Judge Cooley said: "Highway authorities have no more right than private citizens to cut drains, the necessary result of which will be to flood the lands of individuals." See *Wilson v. Marsh*, 34 Vt. 352; *Lacom v. Mayor*, 3 Duer, 406; *Lloyd v. Mayor*, 5 N. Y. 369, S. C. 55 Am. Dec. 347; *City of Camden v. Mulford*, 2 Dutch N. J. 56.

<sup>3</sup> *Corbett v. Bradley*, 7 Nev. 106; *Koch v. Bridges*, 45 Miss. 247; *Entwistle v. Dent*, 1 Exch. 811. In the case of the *People v. Supervisors*, 11 Abb. Pr. R. 114, it was said: "The grant by the legislature of an official power involves a corresponding public

duty; and where the power is not expressly discretionary, its exercise is a peremptory public duty. The mere constitutional grant of the power, without any express or positive injunction of its exercise, makes its exercise a peremptory duty, when, or as an occasion for its exercise arises; unless the statute conferring the power, expressly leaves it to the discretion of the officer or officers upon whom the power is conferred, whether he or they shall, or shall not, exercise the power. Public official powers must be supposed to be granted from public motives, and for the public good, and their exercise is not a matter of discretion, unless expressly made so."

<sup>4</sup> *Mason v. Fearson*, 9 How. 248; *Supervisors v. United States*, 4 Wall. 435; *People v. Supervisors*, 51 N. Y. 442; *City of Madison v. Smith*, 83 Ind. 502; *City of Indianapolis v. McAvoy*, 86 Ind. 587.

It is an ancient and firmly established rule that where a public officer is commanded by a valid statute to do a prescribed act and he does the act required of him by the statute in a reasonably careful, diligent and skillful manner, he is not liable, although special injury to a citizen may result from the performance of the act.<sup>1</sup> It is not enough in any case to show loss or damages merely, for, to complete a cause of action, it must be shown that there was legal injury, and legal injury there can not be where the officer rightfully does what the law commands him to do. The principle underlying this rule is the same as that which protects municipal corporations from liability in cases where they change the grade of a street in conformity to law.

Highway officers who have an imperative duty imposed upon them by law must do what they are commanded to do, and if they negligently fail to obey the command they may be liable to one who has suffered a special injury from their neglect of duty. Whether the duty is mandatory or discretionary, whether it is one in which individuals have a direct and peculiar interest, or whether it is one owing only to the public or the State, are matters to be determined from the provisions of the statute. The nature of the duty need not be declared in direct words in order to make it an imperative one, for the courts may infer it to be of that character by considering the language employed by the legislature, the evil to be remedied, the object to be accomplished and kindred matters.<sup>2</sup>

Where a duty to improve or repair a road or street is an imperative one, and is one in which an individual has a peculiar

<sup>1</sup> *Sutton v. Clarke*, 6 Taunt. 29; *Boulton v. Crowthers*, 2 Barn. & C. 703; *Aldrich v. Cheshire, etc., Co.*, 21 N. H. 359, S. C. 53 Am. Dec. 212; *Stewart v. Southard*, 17 Ohio, 402, S. C. 49 Am. Dec. 463; *American Print Works v. Lawrence*, 3 Zabr. 590, S. C. 57 Am. Dec. 420.

<sup>2</sup> *Austin v. Carter*, 1 Mass. 231; *State v. Halifax*, 4 Dev. 345. See, also, *Newman v. Sylvester*, 42 Ind. 106; *Perry v. Barnett*, 65 Ind. 522, 525. "The nature

of the duty," says Judge Cooley, "in any case suggests the remedy in case of neglect. If the duty he has failed to perform is a duty to the State, he is amenable to the State for his fault; while for the neglect of duties to individuals, only the person who is injured may maintain suit." Cooley on Torts, 376. The facts constituting the duty should be pleaded; it is not sufficient to aver it as a conclusion of law. *Butler v. State*, 17 Ind. 450.



private interest as distinguished from that which he has in common with other members of the community, the highway officer who negligently performs the duty so enjoined upon him must make good to the individual any special loss or damage that he may have sustained, provided the law has placed at the command of the officer the funds necessary to enable him to perform the duty imposed upon him.<sup>1</sup> It is evident that justice requires that an officer, who has no funds to enable him to perform his duty, should not be held liable for a failure to do that which he has not the means of doing without advancing his own money. Essentially the same rule which exempts a public corporation from liability where it has no funds at its command, exonerates a highway officer for failing to do what the law commands him to do.<sup>2</sup> There are cases holding that where an imperative duty is enjoined and a penalty is prescribed for a wrongful omission of the duty, no private action can be maintained, but that the exclusive remedy is that which the statute provides.<sup>3</sup> But there is reason to doubt the soundness of this doctrine except in cases where the language of the statute expressly or impliedly confines the right to a recovery of the penalty, for where private rights are invaded the citizen may have his remedy, although the public may also punish the wrongdoer. The rights of the citizen and those of the public are distinct and different, and a statute giving a right to prosecute a negligent officer does not necessarily cut off all redress for a private wrong suffered by one who has sustained a special injury.

<sup>1</sup> *Hover v. Barkhoof*, 44 N. Y. 113; *People v. Board*, 75 N. Y. 316; *Huffman v. San Joaquin*, 21 Cal. 426; *Babcock v. Gifford*, 29 Hun. 186; *County Comm'rs v. Gibson*, 36 Md. 229, 235; *State v. Demaree*, 80 Ind. 522; *Hathaway v. Hinton*, 1 Jones (N. C.), 243; *Griffith v. Follett*, 20 Barb. 620; *Sawyer v. Corse*, 17 Gratt. 230; *Adsit v. Brady*, 4 Hill, 630, S. C. 40 Am. Dec. 305, auth. note. *Contra*, *Bartlett v. Crozier*, 17 Johns. 449, S. C. 8 Am. Dec. 428; *Weet v. Brockport*, 16 N. Y. 161, 168, holding that there can be no

individual liability. See, also, *Lynn v. Adams*, 2 Ind. 143; *Dunlap v. Knapp*, 14 Ohio St. 64; *McConnell v. Dewey*, 5 Neb. 385.

<sup>2</sup> *Smith v. Wright*, 27 Barb. 621; *McKenzie v. Chavin*, 1 McMull. 222; *Wilson v. Jefferson*, 13 Ia. 181. See, also, *People v. Board*, 93 N. Y. 397; *Hines v. City of Lockport*, 50 N. Y. 236.

<sup>3</sup> *Thornton v. Springer*, 5 Tex. 587; *Morgan v. Monmouth Pl. R. Co.*, 26 N. J. L. 99; *Sussex Freeholders v. Strader*, 18 N. J. L. 108.

Where a highway officer does an act that is illegal, he is liable whether his intention was wrong or not,<sup>1</sup> but we suppose that this rule obtains only in cases where there is a violation of a clear and imperative duty. It has been held that where a road supervisor in the exercise of an honest judgment obstructs an ancient water-course by improving a public road, no action can be maintained against him, and that the remedy of the injured land owner is to secure an assessment of damages in due course of law, but we regard this decision as clearly erroneous.<sup>2</sup> The obstruction of the water-course was an invasion of the land owner's rights, and not a mere consequential injury resulting from the lawful act of the officer, for the principal act was itself illegal, and the injury proximately resulted from it. We can not understand upon what principle it can be held, that where a highway officer takes private property which he has no right to seize without due process of law under the power of eminent domain, the land owner can not compel him to account, but must himself seek his damages by a proceeding under the right of eminent domain. In an earlier decision<sup>3</sup> by the same court it was held that an action would lie where a supervisor acts beyond the scope of his authority, and, surely, he does this when he takes property rights which he can rightfully secure only by proceeding in due form of law. We suppose it quite clear that until a highway officer secures a right to use private property by virtue of a lawful appropriation he is a wrong-doer, and as such liable to an individual upon whom he inflicts a special injury. While the officer will not be protected where he acts outside of the scope of his authority in interfering with private rights of property, whatever may be his intention, still he is liable only for negligence, and he will be protected if it is not shown that he failed to use ordinary care, skill, or diligence.<sup>4</sup>

In former chapters brief references have been made to the liability of highway officers for trespasses and other unauthorized

<sup>1</sup> Keith v. Howard, 24 Pick. 292;

<sup>3</sup> Conwell v. Emrie, 4 Ind. 209.

Gates v. Neal, 23 Pick. 308.

<sup>4</sup> Clark v. Saratoga, etc., Co. (N. Y.),

<sup>2</sup> McOsker v. Burrell, 55 Ind. 425.

14 N. E. R. 415.

See, also, Spitznogle v. Ward, 64 Ind.

and wrongful acts, and, while we do not deem it necessary to consider the subject at much length at this place, it seems proper to here consider some phases of the general question, and we preface our discussion by saying that it may be safely affirmed that a highway officer who interferes with private property to the injury of the owner without legal excuse or justification is a trespasser, and, as such, answerable for a special injury inflicted upon private property. It was held in one case that selectmen who directed a private individual to cut timber for the purpose of making a road passable, were liable to the owner for all the unnecessary damage that was done.<sup>1</sup> A liability exists where highway commissioners deviate from the line of the public way lawfully established and enter upon private property,<sup>2</sup> and so it does where they wrongfully take what the public easement does not authorize them to appropriate.<sup>3</sup> An unlawful interference with the rights of a riparian proprietor is actionable.<sup>4</sup> Where there is an attempt to appropriate land for a public road and the proceedings are void because there is no jurisdiction, the ministerial officer who enters on the land for the purpose of opening the road to the public may be treated as a trespasser.<sup>5</sup> So where a ministerial officer decides that to be a nuisance which in fact and in law is not, he may be made to respond in damages to an owner whose property he injures or destroys.<sup>6</sup> Where a street was marked on a plat but never opened, and the public had lost its right to open it, an officer who entered and dug an excavation was held liable.<sup>7</sup>

A highway officer who interferes with private property where

<sup>1</sup>*Ely v. Parsons*, 55 Conn. 83, S. C. 10 Atl. R. 499. It is difficult, however, to reconcile the decision in this case with that made in the case of *McKenna v. Kimball*, 145 Mass. 555.

<sup>2</sup>*Beckwith v. Beckwith*, 22 Ohio St. 180; *Beardslee v. French*, 7 Conn. 125; *Miller v. Sillsby*, 8 N. H. 474.

<sup>3</sup>*Tucker v. Eldred*, 6 R. I. 404; *Muazey v. Davis*, 54 Me. 361.

<sup>4</sup>*McCord v. High*, 24 Ia. 336; See *Cubit v. O'Dett*, 51 Mich. 347.

<sup>5</sup>*Names v. Highway Com'rs*, 30 Mich. 490.

<sup>6</sup>*Cole v. Kegler*, 64 Ia. 59. If a supervisor influenced by malice removes a house without right although he assumes to act in an official capacity, it is quite clear that he incurs a personal liability. *Wilding v. Huff*, 37 Ia. 446.

<sup>7</sup>*Buskirk v. Strickland*, 47 Mich. 389. See, generally, *Shroup v. Shields*, 116 Ill. 488.

there is no law authorizing such an interference, and no protecting judgment, is liable to a property owner who suffers a special injury from his acts. The rule upon this subject goes so far as to make him liable where he assumes to act under an unconstitutional statute.<sup>1</sup> This must necessarily be so in highway cases, since highway officers possess only such authority as the law confers and where there is no law there can be no authority. If the officer actually invades the rights of a citizen, his wrong can not be justified upon the ground that he was mistaken as to the law, for a mistake of law will no more excuse an officer who commits a tort than it will an individual.<sup>2</sup>

A seizure of property or an entry upon land is wrongful and actionable unless the officer is clothed with the requisite authority, and authority exists only where the seizure or entry is under due process of law. Where the entry is made for the purpose of opening a highway, it will be actionable unless a right to the land has been acquired in some appropriate legal mode.<sup>3</sup> Such process as is necessary to authorize a subordinate ministerial officer to act should be issued to him prior to the entry on the land, but if the highway was duly established by law or effectively dedicated, we can see no reason why the owner should be permitted to recover more than nominal damages where no wrong is shown beyond that involved in the unauthorized entry and it is unauthorized only because the formal process was not in the hands of the officer, for if the public does own an easement in the land no actual damages can result from the mere entry by the officer.<sup>4</sup> If, however, actual damages are shown, then they are recoverable.

Where a highway officer directs a subordinate or other per-

<sup>1</sup> *Antrim v. Hammond*, 3 McLean, 107; *Warren v. Kelley*, 80 Me. 512, S. C. 15 Atl. R. 49; *Fisher v. McGirr*, 1 Gray, 45; *Warren v. Mayor, etc.*, 2 Gray, 84, 97; *Norton v. Shelley County*, 118 U. S. 442; *Virginia Coupon Cases*, 114 U. S. 270.

<sup>2</sup> *Porter v. Thompson*, 22 Ia. 391; *Amy v. Supervisors*, 11 Wall. 136.

<sup>3</sup> *Beyer v. Tanner*, 29 Ill. 135; *Barnard v. Haworth*, 9 Ind. 103; *Mosier v.*

*Vincent*, 34 Ia. 478; *Campbell v. Kennedy*, 34 Ia. 494; *Gutpail v. Teft*, 16 Ill. 365. But a mere irregularity will not make the officer liable. *Yeager v. Carpenter*, 8 Leigh. 454.

<sup>4</sup> We suppose that where no actual loss results, no more than nominal damages can be recovered, although there is not a perfect and complete justification.

son to commit a trespass he is equally as guilty as the person who obeys his command or direction, and actually commits the wrong.<sup>1</sup> It has been held upon what seems strong grounds, that the officer who gives the command or direction may be regarded as a trespasser although he acted in good faith, and in the honest belief that he had authority to do the act which constituted the trespass.<sup>2</sup> But where persons are under the general supervision or control of an officer, but are not chosen or selected by him, and whom he has not the right to discharge, he is not liable for torts committed by them unless he has directly or indirectly authorized or required them to do the wrongful act. If, however, he imposes upon persons whom he has a general authority to control work that can not be done without causing injury to others, he is responsible, although the persons who do the work may be independent subordinate officers. But where the work which he directs to be performed is within the scope of his authority and can be done without injury to others, and he is not negligent, either in omitting something to be done that ordinary care requires should be done, or in doing or in directing something to be done that ordinary care requires should not be done, he is not responsible, although persons not selected by him, but by whom the work is actually done, so negligently perform it as to cause injury to others. He is bound to use due care and skill so far as he acts in the matter, but his responsibility is not an absolute one. It is in consonance with this general doctrine that it was held that a county commissioner, although specially charged with the duty of keeping roads in repair, was not liable for injuries to a traveler resulting from the negligence of a laborer employed by the road supervisor, an independent officer under the law who was charged with similar duties.<sup>3</sup> But in another recent case a

<sup>1</sup> *Ely v. Parsons*, 55 Conn. 83, S. C. 10 Atl. R. 499.

<sup>2</sup> *State v. Smith*, 78 Me. 260, S. C. 57 Am. R. 802. It is unquestionably the law that one who directs or procures another to commit a trespass is liable as a principal wrong-doer. *Guille v. Swan*, 19 John. 382; *Lovejoy v. Murray*, 3 Wall. 1; *Bachelor v. Pinkham*,

68 Me. 253; *Dreyer v. Ming*, 23 Miss. 434. There is no reason why this general rule should not apply to an officer who directs or procures the performance of a specific wrongful act.

<sup>3</sup> *Anne Arundel Co. Com'rs. v. Duval*, 54 Md. 350, S. C. 39 Am. Rep. 393. See, also, *McGuire v. Grant*, 1 Dutch. (N. J.) 356, S. C. 67 Am. Dec. 49.

street commissioner was held liable for removing the lateral support of adjoining land by excavating in a street which had been platted but never opened or used.<sup>1</sup>

There is some conflict in the authorities as to how far a public officer is liable for the acts of his subordinates.<sup>2</sup> It is quite clear that where the officer occupies the position of a deputy, the general rule is that his superior is liable, but this rule can not, without injustice, be applied to subordinate officers not occupying the position of deputies in the service of officers in charge of roads and streets. In a recent case the Supreme Court of the United States said : " A public officer or agent is not responsible for the misfeasances or positive wrongs, or for the malfeasances, negligences or omissions of duty of the sub-agents or servants, or other persons employed by or under him in the discharge of his duties."<sup>3</sup> This rule applies quite as strongly to highway officers as to the class of officers named in the cases cited in the note, which cases were recognized as correctly expressing the law in the case from which we have quoted. There is, indeed, stronger and more satisfactory reason for the rule in cases of highway officers than in the classes of officers referred to in those cases, as is demonstrated in a well reasoned opinion by the Court of Appeals of New York.<sup>4</sup> A highway officer can not escape liability for the negligent performance of a duty imposed upon him by law by entrusting that duty to another,<sup>5</sup> but where it is impossible for him to perform the duty himself, and he is free from personal wrong or negligence, he ought not to be held responsible for the negligence of a subordinate whom he has been compelled to employ.<sup>6</sup>

<sup>1</sup> *Buskirk v. Strickland*, 47 Mich. 389. The decision in this case proceeds upon a different principle from that asserted in the text, and in the cases referred to in the preceding note.

<sup>2</sup> *McKenna v. Kimball*, 145 Mass. 555; *Russell v. Lynnfield*, 116 Mass. 365; *Hill v. Boston*, 122 Mass. 344; *Blunt v. Shepard*, 1 Mo. 219; *Richmond v. Long*, 17 Gratt. 375.

<sup>3</sup> *Robertson v. Sichel*, 127 U. S. 507. The court cited the cases of *Keenan v.*

*Southworth*, 110 Mass. 474; *Lane v. Cotton*, 1 Ld. Raymond, 646, S. C. 12 Mod. 472; *Dunlop v. Monroe*, 7 Cranch. 242; *Schroyer v. Lynch*, 8 Watts. 453; *Bishop v. Williamson*, 2 Fair. (Me.) 495; *Hutchins v. Brackett*, 22 N. H. 252; *Conwell v. Voorhees*, 13 Ohio, 523.

<sup>4</sup> *People v. Campbell*, 82 N. Y. 247.

<sup>5</sup> *Pickard v. Smith*, 19 C. B. N. S. 480.

<sup>6</sup> *Rubens v. Robertson*, 38 Fed. R. 86; *Donovan v. McAlpin*, 85 N. Y. 185.

If the officer is himself guilty of negligence, whether that negligence consists in doing what he ought not to have done, or in omitting to do what it was his duty to do, he is liable. It is his duty to use reasonable care in the selection of his subordinates, and if he fails to do this, his neglect of duty is actionable.<sup>1</sup> The officer is bound to exercise ordinary care in the superintendence and supervision of the acts of his subordinates, and he can not, without subjecting himself to a liability to one injured, assign them work they are not competent to perform unless he first uses reasonable care to ascertain their competency.<sup>2</sup>

A ministerial highway officer whose duty it is to execute the process of a board of commissioners, or other tribunal invested with the power to hear and decide controversies concerning roads and streets, will be protected if the process is regular on its face and issued in a matter of which the tribunal had jurisdiction, unless he knows that in fact the proceeding was without validity. If there is jurisdiction the officer will be protected, as the later and better reasoned cases hold, although there may be such irregularities as would defeat the proceeding upon a direct attack. It seems to us that as the proceeding can not be regarded as an *ex parte* one, but must be regarded as an adversary one, the officer will be protected in every instance where the order or judgment will stand against a collateral suit or action.<sup>3</sup> To entitle a ministerial officer to protection from the process under which he assumes to act, he must pursue the course prescribed by law and execute the process issued to him in the mode pointed out. To do this it is necessary for him to give such preliminary notices as the law requires and to serve them at the time and upon the persons designated by the law. A failure to obey the law in any substantial particular

<sup>1</sup> Dunlop v. Monroe, 7 Cranch. 242.

<sup>2</sup> Caslet v. Duryea, 32 Barb. 480.

<sup>3</sup> Porter v. Purdy, 29 N. Y. 106, S. C., 86 Am. Dec. 283; Ham v. Silvernail, 7 Hun. 33; Thurston v. City of Elmira,

10 Abbott's Pr. R. N. S. 119; Allen v.

Utica, 15 Hun. 80; Roderigas v. East

River, 63 N. Y. 464; Comstock v.

Crawford, 3 Wall. 405; Warren v.

Kelly, 80 Me. 512, S. C. 15 Atl. R. 49.

takes from the officer all the protection his process would otherwise give him.<sup>1</sup>

We have suggested that the fact that a highway officer may be punished for a breach of duty by a criminal prosecution can not be considered as a sufficient reason for denying redress to a private individual who suffers a special injury, and we think that the principle which entitles such a person to a private action for damages entitles him to relief by mandamus in the proper case. It is no answer to a private demand for relief where the individual suffers an injury of a special and peculiar character to assert that the wrong-doer is liable to prosecution by indictment or information. The analogies forbid such a conclusion. A man may be sued for damages resulting from an assault and battery, for damages resulting from the unlawful burning of a building, for damages resulting from a libel, for damages resulting from a false imprisonment, and for many other wrongs, yet for all such wrongs the tortfeasor may be punished in a criminal prosecution. It is simply an arbitrary exercise of power to deny the right to a party specially injured in one class of cases and yield it to him in another class. Where the breach concerns the public or the State and there is no special grief, then there is a reason for denying the right to maintain a private action for mandamus or for damages, but this reason vanishes when a special injury appears, since with that special injury the public has no direct concern, and relief to the State or punishment for the good of the public, does not repair the loss or injury of the citizen. It is true that there is much authority against the doctrine which commands our assent,<sup>2</sup> but there are decisions of eminent courts which fully sustain it.<sup>3</sup> We think

<sup>1</sup> *Mosier v. Vincent*, 34 Ia. 478; *Blackburn v. Powers*, 40 Ia. 681; *Barrett v. Nelson*, 29 Kan. 594.

<sup>2</sup> *Reg. v. Oxford*, 12 A. & E. 427; *Rex v. Comm'rs of Dean*, 2 M. & S. 85; *Rex v. Seven, etc., Co.*, 2 B. & Ald. 646; *Reading v. Com.*, 11 Pa. St. 196.

<sup>3</sup> *Queen v. Eastern Counties, etc., Co.*, 10 Ad. & E. 251; *King v. Severn, etc., Co.*, 2 Bain. & Ald. 644; *People v. Mayor*, 10 Wend. 395; *In re Trenton*,

*etc., Co.*, Spencer, 659; *Fremont v. Crippen*, 10 Cal. 211. An English author says: "If an indictment would adequately furnish the relief sought, a mandamus will not be granted, but when an indictment will be so regarded is not very clear from the cases." *Heard's Short on Extraordinary Remedies*, 238. To us it seems quite plain that where a special injury is sustained by an individual, the remedy by indict-



Mr. Grant indicates the true rule when he says: "But a mandamus does not go against a corporation to enforce against them the general law of the land, if an action will lie, notwithstanding it may be granted in some cases where an indictment may be had."<sup>1</sup> An individual who seeks redress for a special injury does not seek to enforce the general law of the land, for his object is simply to vindicate a right peculiar to himself and different in kind, and not only in degree, from that suffered by the public.<sup>2</sup>

There are many instances in which a mandate has been awarded in matters concerning roads and streets against county and municipal officers. Mandamus will lie to compel an auditor to countersign street assessment warrants.<sup>3</sup> The writ will issue to compel a surveyor to perform his duty,<sup>4</sup> and to compel payment to a contractor of money collected by an assessment for an improvement made by him. Mandamus will be granted to compel an officer to draw a warrant for the expense of repairing a bridge which forms part of a highway;<sup>5</sup> to compel the proper officer to abate a public nuisance where the law imposes upon him that duty.<sup>6</sup> The writ will issue to compel an officer to perform an imperative duty by removing obstructions from a highway.<sup>7</sup> An officer may be compelled by mandamus to record the order establishing a highway.<sup>8</sup> It is an appropriate remedy to compel the opening of highways,<sup>9</sup> and so it is in the proper case to compel officers to proceed with the improvement

ment is in no just sense adequate, for it simply punishes the wrong-doer without giving the sufferer any redress for the injury inflicted.

<sup>1</sup> Grant on Corporations, 160.

<sup>2</sup> Wood v. Strother, 76 Cal. 545, S. C. 18 Pac. R. 766. Mandamus will not issue to compel the payment of interest on street assessment warrants containing no promise to pay interest. Talbot v. Bay City (Mich.), 38 N. W. R. 890.

<sup>3</sup> Roberts v. Davidson, 83 Ky. 279.

<sup>4</sup> Sheridan v. Fleming, 93 Mo. 321.

<sup>5</sup> State v. Titus, 47 N. J. L. 89.

<sup>6</sup> People v. Newton, 20 Abbott's Cases (N. Y.), 387.

<sup>7</sup> People v. Comm'rs (Ill.), 22 N. E. R. 596. See, also, *In re* Corporation of Moulton, 12 App. R. (Ont.) 503; Bracconier v. Packard, 136 Mass. 50.

<sup>8</sup> People v. Collins, 7 Johns. R. 549. See, also, People v. Supervisors of Sullivan County, 56 N. Y. 249; City of Lafayette v. State, 69 Ind. 218; State v. Wilson, 17 Wis. 687.

<sup>9</sup> People v. Supervisors of San Francisco, 36 Cal. 595. See People v. Commissioners, 1 Cow. 23; People v. Jeffers, 4 N. Y. Sup. Ct. 398.

of a street without unreasonable delay and to make an improvement where it is their imperative duty to do so.<sup>1</sup>

Where the duty to open, construct, improve or repair is imposed upon a public corporation as a corporate one, then it is against the corporation that the writ must issue, and there are many cases where it has been issued against public corporations.<sup>2</sup> But there are many cases where the breach of duty is that of the officers and not of the public corporation, and in such cases the action must be brought against the officer and not the corporation. If, for example, an engineer elected by the voters of a city should refuse to make an estimate as the law requires, the action should be brought against him and not against the corporation, and this example will serve to illustrate and enforce our meaning. Whether the duty sought to be enforced is a general corporate one or a duty specifically imposed upon an officer elected by the inhabitants of the locality is to be determined from the provisions of the statute creating the office and prescribing the duties of the officer. In many instances the duty is such that the writ of mandate should issue only against the derelict officer, and not against the corporation, for where it is not the corporation acting through its legal representatives, but an officer connected with the corporation that refuses to perform a duty, the action should, it is manifest, be against the wrong-doing officer.

It is established law that mandamus will not issue to control the discretionary power of a tribunal or officer, although it may issue to compel the exercise of that power, that is, it may issue to compel the tribunal or officer to act, but it will not direct what the action shall be. Mandamus will not be granted where its effect would be to subject an officer to an action of trespass,<sup>3</sup> nor, as it has been held, will it be granted to compel an officer to re-

<sup>1</sup> *People v. Common Council*, 22 Barb. 404. See, also, *City of Ottawa v. People*, 48 Ill. 233.

<sup>2</sup> *McMahon v. Board of Supervisors*, 46 Cal. 214; *Borough of Uniontown v. Com.*, 34 Pa. St. 293; *Comm'rs of York v. Com.*, 72 Pa. St. 24; *People v. City of Bloomington*, 63 Ill. 207. *State v.*

*Supervisors of Wood County*, 41 Wis. 28; *Pumphrey v. Mayor, etc.*, 47 Md. 145; *Trustees v. Kinner*, 13 Bush. 334; *Wren v. City of Indianapolis*, 96 Ind. 206; *City of Greenfield v. State*, 113 Ind. 597.

<sup>3</sup> *Ex parte Clapper*, 3 Hill, 458. See, also, *People v. Com'rs*, 27 Barb. 94.

move an obstruction from a road where there is a good faith controversy as to the legal existence of the road.<sup>1</sup> Nor will a mandamus be granted to compel a highway officer to lay out and open a road unless it appears that he has funds sufficient for that purpose.<sup>2</sup>

At common law and in most of the States, highway officers, who wrongfully fail or refuse to perform a duty enjoined upon them by law, are punishable by indictment or information.<sup>3</sup>

<sup>1</sup> *State v. Buhler*, 90 Mo. 560.

<sup>2</sup> *Garlinghouse v. Jacobs*, 29 N. Y. 303.

<sup>3</sup> See statutes of different States referred to in 2 *Shearn. & Red. on Neg.* (4th ed.), section 340, *n.* 1; *State v. Kern*, 51 N. J. L. 259, S. C. 17 Atl. R.

114. In Tennessee and South Carolina, it seems that the entire board of commissioners or the town corporation as a whole must be indicted for neglect to repair highways. *State v. Barksdale*, 5 Humph. 154; *Hill v. State*, 4 Sneed, 443; *State v. Chappell*, 2 Hill, 391.

## CHAPTER XXVI.

### RIGHTS AND REMEDIES OF ABUTTERS.

The owner of land abutting<sup>1</sup> upon a highway, as one of the public, has all the rights to its use that belong to the public generally, the chief of which is the right of passage and repassage. This right he may enforce by properly removing an unlawful obstruction,<sup>2</sup> but he can not, without showing a special damage or injury, recover for the invasion of such public right of travel by a suit in his own name.<sup>3</sup> He has, however, in addition to his rights as a member of the general public, certain peculiar rights belonging to him as an abutter. The presumption is that the adjoining proprietors on each side of a road own to its center.<sup>4</sup> As such owners, they have the exclusive right to the soil, subject only to the easement of the right of passage in the public and the incidental right of properly fitting the way for use.<sup>5</sup> Subject only to the public easement, the proprietor has

<sup>1</sup> As to when land is considered as "adjoining" or "abutting upon" a highway, see *Lightbound v. Bebington Board*, L. R. 14 Q. B. 849; *Wakefield Board v. Lee*, 1 L. R. Ex. Div. 336; *Holt v. City Council*, 127 Mass. 408; *Newport v. Graham*, L. R., 9 Q. B. 183; *Akers v. U. N. J. R. R. Co.*, 43 N. J. L. 110; *Philadelphia v. Eastwick*, 35 Pa. St. 75.

<sup>2</sup> *Cooley's Blackstone*, 5, and note; *Lincoln v. Chadbourne*, 56 Me. 197; *Cooley on Torts*, 46; 1 *Addison on Torts*, section 270; *James v. Hayward*, Cro. Car. 184; *Burton v. Dougherty*, 19 New Bruns. 51.

<sup>3</sup> *Matlock v. Hawkins*, 92 Ind. 225; *Bigley v. Nunan*, 53 Cal. 403; *Wood on Nuisance*, section 655.

<sup>4</sup> 3 Kent. Comm. 432; *Willoughby v. Jenks*, 20 Wend. 90; *Mott v. New York*, 2 Hill, 358; *Peabody Heights Co. v. Sadtler*, 63 Md. 533; *Vaughn v. Stuzaker*, 16 Ind. 338; *Cox v. Louisville, etc., R. Co.*, 48 Ind. 178; *Stephens v. Whistler*, 1 East, 51; *Terre Haute, etc., R. Co. v. Rodel*, 89 Ind. 128; *Rice v. County of Worcester*, 11 Gray, 283; *City of Boston v. Richardson*, 13 Allen, 146, 153; *Florida, etc., R'y Co. v. Brown*, 23 Fla. 104.

<sup>5</sup> 3 Kt. 432; *Dovaston v. Payne*, 2 H. Blacks. 527; *Stackpole v. Healey*, 16 Mass. 33; *Perley v. Chandler*, 6 Mass. 454; *Cooke v. Greene*, 11 Price, 736; *Cole v. Drew*, 44 Vt. 49, S. C. 8 Am. Rep. 363; *Holden v. Shattuck*, 34 Vt. 336; *City of Dubuque v. Maloney*, 9

all the usual rights and remedies of the owner of a freehold.<sup>1</sup> He may sink a drain below the surface of the road, if proper care be taken to cover it so that it shall remain safe and convenient.<sup>2</sup> He may carry water in pipes under the way,<sup>3</sup> and he may mine under it.<sup>4</sup> So, the herbage<sup>5</sup> and trees<sup>6</sup> growing thereon belong to him, unless needed to repair the way. Thus, where a woman, under the direction of the highway surveyor, cut the grass growing in a highway, in order that her children might go to school without getting their clothes wet, it was held that she was guilty of no wrong in so doing, but as she carried the grass away, after cutting it, and fed it to her husband's horse, it was further held that she then became a trespasser *ab initio*, and that the maxim, *de minimis non curat lex*, was not applicable to such a case.<sup>7</sup> In Maine, the owner of the fee

Ia. 450; Jackson v. Hathaway, 15 Johns. 447; Phifer v. Cox, 21 Ohio St. 248; Cox v. Louisville, etc., R. R. Co., 48 Ind. 178; Charleston, etc., Co. v. Bennett, 18 S. Car. 254; Lade v. Shepherd, 2 Str. 1004; Chatham v. Brainard, 11 Conn. 59; Kennedy v. Jones, 11 Ala. 63. "The owner of the soil has right to all above and under ground, except only the right of passage for the king and his people." *Per* Foster, J., in Goodtitle v. Alker, 1 Burr. 122, 133.

<sup>1</sup>Stevenson v. Mayor (Tenn.), 4 Am. & Eng. Corp. Cas. 503; Overman v. May, 35 Ia. 89; Comm'rs v. Beckwith, 10 Kan. 603; West Covington v. Freking, 8 Bush. (Ky.) 121; Pomeroy v. Mills, 3 Vt. 279, S. C. 23 Am. Dec. 207; State v. Laverack, 34 N. J. L. 201; St. Mary Newington v. Jacobs, L. R., 7 Q. B. 47, 53; Bliss v. Ball, 99 Mass. 597. <sup>2</sup>Perley v. Chandler, 6 Mass. 454, S. C. 4 Am. Dec. 159. But an abutter can not sink a drain in a street in such a manner as to interfere with any of the public uses to which a street may rightfully be devoted. The rights of the public are paramount for all legitimate uses.

<sup>3</sup>3 Kt. Com. 433.

<sup>4</sup>Goodtitle v. Alker, 1 Burr. 133; Davison v. Gill, 1 East, 64.

<sup>5</sup>Cooley on Torts, 318; Woodruff v. Neal, 28 Conn. 165; Cole v. Drew, 44 Vt. 49, S. C. 8 Am. Rep. 363; Stackpole v. Healy, 16 Mass. 33, S. C. 8 Am. Dec. 121.

<sup>6</sup>Overman v. May, 35 Ia. 89; Lyon v. Gormley, 53 Pa. St. 263; Comm'rs v. Beckwith, 10 Kan. 603; Clark v. Dasso, 34 Mich. 86; Baker v. Shepard, 24 N. H. 208.

<sup>7</sup>Cole v. Drew, 44 Vt. 49, S. C. 8 Am. Rep. 363. "The smallness of the value does not justify a seizure of the fee without due and lawful authority, or its destruction by indirect rulings. No invasion of the property rights of the citizen can safely be deemed trifling." *Per* Finch, J., in Robert v. Sadler, 104 N. Y. 229, S. C. 58 Am. Rep. 498, 500. The principle which is involved in the cases cited is an important one, for it is the principle upon which rest the cases holding that where the continuance of a wrong may ripen into a claim of right, an action will lie. Webb v. Portland Man. Co., 3 Sumner, 189; Ross v. Thompson, 78 Ind. 90, 97.

may lawfully plant ornamental or shade trees within the limits of a highway, provided the public use is not thereby obstructed or endangered, and a highway surveyor who destroys such trees without reason or necessity is a trespasser.<sup>1</sup>

While the owner of the fee is, at common law, entitled to the herbage growing in a highway, this right is more doubtful under the statutes in force in some of the States permitting or empowering local boards to permit cattle to run at large upon the public highways. The constitutionality of these statutes has been questioned in several cases, and the point thus raised is one of no little difficulty. It would seem upon principle that, if the herbage belongs to the owner of the fee, it can not be taken from him either wholly or in part, without compensation, but some of the courts appear to have taken a different view. They do not, however, follow exactly the same course of reasoning. In one case it is said: "It can not with truth be said that a by-law, like the one in question, takes the property of one man and gives it to another, or even to the public, without compensation. The owner of the soil is not deprived of the pasturage any more than he is of the way. He can enjoy both in common with his neighbors."<sup>2</sup> This seems to us like very fallacious reasoning. It might just as well be said that, because the owner of the fee is entitled to travel on the highway in common with his neighbors, he was not deprived of his property and was not entitled to any compensation when the way was originally laid out over his land.<sup>3</sup> In another case, it is said:

<sup>1</sup> *Wellman v. Dickey*, 78 Me. 29, S. C. 2 Atl. Rep. 133. Compare, *Gaylord v. King*, 142 Mass. 495, S. C. 8 N. E. Rep. 596; *Driggs v. Phillips* (N. Y.), 8 N. E. Rep. 514.

<sup>2</sup> *Griffin v. Martin*, 7 Barb. 297. An additional reason given in this case, and one of more weight, perhaps, is that the right of pasturage is incidental to the use of the highway, and that the land owner received full compensation for everything of the kind when the highway was taken in the first instance. We do not, however, understand that the right of pasturage is incidental to

the use of a highway, nor are all highways paid for by the public. Many exist by dedication.

<sup>3</sup> It seems to us, on principle, that the rights of the owner of the fee are exclusive, except in so far as the legitimate public use is concerned, and that the right to pasturage, where it exists, is purely a private right remaining solely in the owner of the fee. Where such a right is consistent with the public use, it is the exclusive right of the owner and is no part of the public easement.

“As a police regulation, we think it competent, under the law in question, for the commissioners to prescribe what kind of animals may run at large. The effect of the regulation is neither to take nor authorize the taking of the property of another. The most that it does is to deprive the owner of the land of the right to prosecute for a trespass so long as he sees fit to leave his lands uninclosed, or fails otherwise to protect it from the incursions of animals having the right to run at large.”<sup>1</sup> That which we conceive to be the true doctrine is thus stated and supported by cogent reasoning in an opinion by Chief Justice Storrs, of Connecticut: “The right on the part of the public, to depasture the land is not necessary for the exercise of their right to pass over it, and the exercise of such a right on the part of the owner is not inconsistent with this public right; the land is not, therefore, sequestered for that purpose when it is laid out as a highway, and no damages are given to the owner for the loss of any such right. \* \* \* On a careful consideration of the subject, we are fully satisfied that the granting or authorizing such a license, no compensation having been in any manner provided for the owner of the land upon which it is to be exercised, is beyond the constitutional power of the legislature. It constitutes the taking of the property of one person for the use, either of another, or of the public. If of the former, it can not be done, either with or without compensation; if of the latter, it may be done, but only on providing compensation.”<sup>2</sup>

The right to the soil of a street belongs to the owner of the

<sup>1</sup> *Welch v. Bowen*, 103 Ind. 252. See, also, *Hardenburgh v. Lockwood*, 25 Barb. 9. It is probably true, as suggested in the first of the cases cited, that where there has been a long continued usage, giving to the statute a practical exposition, an owner whose land is appropriated, or an owner, by whom land is dedicated, may be deemed to part with his land in accordance with such usage and thus lose the exclusive right of pasturage, but independent of such an usage we can not believe that he

parts with more than such an easement as the public requires. The extent of the easement is, of course, to be determined from the character and situation of the public way.

<sup>2</sup> *Woodruff v. Neal*, 28 Conn. 165, 168. See, also, *dicta* to same effect in *Campau v. Konan*, 39 Mich. 362, 365; *Holladay v. Marsh*, 3 Wend. 142; *Tonawanda R. R. Co. v. Munger*, 5 Denio, 255, 264, S. C. 49 Am. Dec. 239; *Bush v. Brainard*, 1 Cow. 78, note 88.

fee, and where, as in most cases, the municipal corporation does not own the fee it has no right to remove the earth from a street unless its removal is necessary for the improvement of the street, or of a street forming a part of the same system of improvement.<sup>1</sup> If its removal is necessary, the city can not even then use it in the improvement of other streets not included in the same general plan of improvement, over the objection of the owner of the fee who wants it for his own use.<sup>2</sup> But "where there is a general plan for the gradation and improvement of highways intersecting streets and highways in the vicinity of the one improved are to be deemed part of the same general plan, and soil may be removed from one and placed upon another."<sup>3</sup> It is not, however, to be understood that the owner of the fee has any right to remove earth and gravel from a street where such removal would interfere with the rights of the public.<sup>4</sup> It has often been said that the rights of the public in city streets are, as against the adjoining owner, somewhat broader than in a country road, and we have ourselves approved that doctrine.<sup>5</sup> Some of the courts, relying mainly upon this distinction, have held that a city in grading a street "may remove the soil and use it in grading that street or any other street in the city,"<sup>6</sup> and have laid down the general rule, that, as between the city and the abutter or owner of the fee, the city is

<sup>1</sup> *City of Aurora v. Fox*, 78 Ind. 1; *Robert v. Sadler*, 104 N. Y. 229, S. C. 58 Am. Rep. 498; *Fisher v. City of Rochester*, 6 Lans. 225; *Ladd v. French*, 6 N. Y. Supp. 56. To same effect, *Higgins v. Reynolds*, 31 N. Y. 151; *Williams v. Kenney*, 14 Barb. 629; *Tucker v. Eldred*, 6 R. I. 404. Compare *Bissel v. Collins*, 28 Mich. 277, S. C. 15 Am. R. 217; *Huston v. City of Ft. Atkinson*, 56 Wis. 350.

<sup>2</sup> *Bishop Non-Cont. Law*, section 990; *Macon v. Hill*, 58 Ga. 595; *Leonard v. Cincinnati*, 26 Ohio St. 447; *Cuming v. Prang*, 24 Mich. 514; *City of Delphi v. Evans*, 36 Ind. 90; *Rich v. Minneapolis*, 37 Minn. 423; *Smith v. Rome*, 19 Ga. 89 (disapproved by Judge

*Dillon*, 2 Dill. Munic. Corp., section 689, note 2). But it seems that if the adjoining owner does not remove the soil the city may sell or otherwise dispose of it. *Griswold v. Bay City*, 35 Mich. 452; *Viliski v. Minneapolis*, 41 N. W. R. 1050.

<sup>3</sup> *City of Aurora v. Fox*, 78 Ind. 1, 6; *Hovey v. Mayo*, 43 Me. 322; *New Haven v. Sargent*, 38 Conn. 50, S. C. 9 Am. Rep. 360; *Denniston v. Clark*, 125 Mass. 216.

<sup>4</sup> *Town of Palatine v. Krueger*, 121 Ill. 72, S. C. 12 N. E. R. 75.

<sup>5</sup> See *Ante*, Urban and Suburban Servitudes, chapter XVII.

<sup>6</sup> *Griswold v. Bay City*, 35 Mich. 452.



entitled to all the surplus earth arising from the improvement of a street.<sup>1</sup> We think these cases carry the doctrine above stated to its extreme limit, if, indeed, they do not go beyond that point. The owner parts with only such rights as the public easement requires, and he neither expressly nor impliedly grants rights possessed by him as the owner of the fee. It may be true that he impliedly agrees that all materials needed for the improvement or repair of the way of which he owns the fee, or of a system of which that way forms a part, may be taken, but we think that it can not be justly held that he agrees that materials owned by him as the proprietor of the soil and its incidents can be taken and used for the benefit of some one else in an improvement in which he has no interest. It is extending the rule beyond its legitimate limits to hold that the soil, stone or timber of an owner may be removed and used to improve or repair a way which adds no special value to his property.

Another right of considerable importance to abutters, especially in cities, is the right to use the street in front of their premises by depositing building materials thereon,<sup>2</sup> and for the purpose of loading and unloading goods or merchandise.<sup>3</sup> The temporary use of streets in a reasonable manner for these and similar purposes is justified by public convenience and necessity. As Earl, J., says, in a case lately decided by the New York Court of Appeals, "The primary purpose of streets is use by the public for travel and transportation, and the general rule is, that any obstruction of a street or encroachment thereon, which interferes with such use, is a public nuisance. But there are exceptions to the general rule, born of necessity and justified by public convenience. An abutting owner engaged in building may temporarily encroach upon the street by the de-

<sup>1</sup> *Hovey v. Mayo*, 43 Me. 322; *Davis v. Clinton* (Ia.), 20 Alb. Law Jour. 56. Trees which are not wanted in a highway by the authorities having charge of it may be removed and taken by the owner of the fee. *Wellman v. Dickey*, 78 Me. 29; *Lancaster v. Richardson*, 4 Lans. 136; *Clark v. Dasso*, 34 Mich. 86.

<sup>2</sup> *Wood v. Mears*, 12 Ind. 515; *Cush-*

*ing v. Adams*, 18 Pick. 110; *O'Linda v. Lothrop*, 21 Pick. 292, 297; *Clark v. Fry*, 8 Ohio St. 358, S. C. 72 Am. Dec. 590; *Rex v. Ward*, 4 Ad. & El. 405.

<sup>3</sup> *Haight v. Keokuk*, 4 Ia. 199; *Sikes v. Manchester*, 59 Ia. 65; *Welsh v. Wilson*, 101 N. Y. 254, S. C. 54 Am. R. 698; *Mathews v. Kelsey*, 58 Me. 56; *People v. Horton*, 64 N. Y. 610.

posit of building materials. A tradesman may convey goods through the street to or from his adjoining store. A coach or omnibus may stop in the street to take up or set down passengers; and the use of a street for public travel may be temporarily interfered with in a variety of other ways without the creation of what in the law is deemed to be a nuisance.<sup>1</sup> The use must, however, be temporary and reasonable,<sup>2</sup> and whether it is or not is generally a question of fact depending upon the circumstances of the particular case.<sup>3</sup> The fact that a business is lawful in itself and can be carried on most conveniently in the street does not justify a permanent and unreasonable use of the street for that purpose. The abutter "is not to eke out the inconvenience of his own premises by taking the public highway into his timber yard."<sup>4</sup> And no one has a right to appropriate a portion of a street to his exclusive use in displaying his goods or carrying on his business, even though enough space be left for the passage of the public.<sup>5</sup> Nor has a tradesman any right to so conduct his business as to collect teams or crowds of people in front of his store to such an extent as to interfere with the public travel.<sup>6</sup> And the owner of land over which a highway is laid out has no right to obstruct it merely

<sup>1</sup> *Callanan v. Gilman*, 107 N. Y. 360, S. C. 1 Am. St. Rep. 831.

<sup>2</sup> *People v. Cunningham*, 1 Denio, 524, S. C. 43 Am. Dec. 709; *Bennett v. Lovell*, 12 R. I. 166; *City of Ft. Wayne v. DeWitt*, 47 Ind. 391, 395; *McCloughry v. Finney*, 37 La. Ann. 27; *Fritz v. Hobson*, 42 L. T. N. S. 225.

<sup>3</sup> *Callanan v. Gilman*, 107 N. Y. 360; *Denby v. Willer*, 59 Wis. 240; *State v. Edens*, 85 N. Car. 526; *Jochem v. Robinson*, 66 Wis. 638, S. C. 57 Am. Rep. 298.

<sup>4</sup> *Per Lord Ellenborough*, in *Rex v. Jones*, 3 Campb. 230. To same effect, *North Manheim Tp. v. Arnold*, 119 Pa. St. 380, S. C. 4 Am. St. Rep. 650, 653; *People v. Cunningham*, 1 Denio, 524, S. C. 43 Am. Dec. 709; *Rex v. Russell*,

6 East, 427; *Commonwealth v. Passmore*, 1 Serg. & R. 217.

<sup>5</sup> *Commonwealth v. Passmore*, 1 Serg. & R. 217; *Lavery v. Hannigan*, 52 N. Y. Super. Ct. 463; *Hart v. Mayor*, 9 Wend. 571, S. C. 24 Am. Dec. 165; *State v. Berdett*, 73 Ind. 185, S. C. 38 Am. Rep. 117; *Pettis v. Johnson*, 56 Ind. 139; *Emerson v. Babcock*, 66 Ia. 257, S. C. 55 Am. Rep. 273; *Hume v. Mayor*, 74 N. Y. 264; *Commonwealth v. Ruggles*, 6 Allen, 588; *Wood on Nuisance*, 257.

<sup>6</sup> *Dennis v. Sipperly*, 17 Hun. 69; *Gilbert v. Mickle*, 4 Sandf. Ch. 357; *Elias v. Sutherland*, 18 Abb. N. Cas. 126; *Rex v. Carlile*, 6 Car. & P. 636. Compare, *Barling v. West*, 29 Wis. 307.

because he has not been paid for the land;<sup>1</sup> nor because he has opened a new road, although the latter may be as convenient for the public as the old way.<sup>2</sup>

The courts of many of the States, after some hesitation, have also recognized an additional right in the adjoining owner, distinct from his rights as a member of the general public, namely, the right of access to his premises, or, as it is called in New York, the "easement of access."<sup>3</sup> This is so far regarded as private property that not even the legislature can take it away and deprive the owner of it without compensation.<sup>4</sup> In New York the abutter has an easement in the light and air over the street, and "above the surface there can be no lawful obstruction to the access of light and air, to the detriment of the abutting owner."<sup>5</sup> In accordance with this doctrine, it has been held that the erection of an elevated railroad, the use of which is intended to be permanent, in a public street, and upon which cars propelled by steam engines, generating gas, steam and smoke, and interrupting the free passage of light and air to and from adjoining premises, constitutes a taking of the ease-

<sup>1</sup> *Draper v. Mackey*, 35 Ark. 497. Compare *Thompson v. State*, 22 Tex. App. 328.

<sup>2</sup> *State v. Harden*, 11 S. Car. 360.

<sup>3</sup> *In re N. Y. Elevated R. R. Co.*, 36 Hun. 427; *Fanning v. Osborne*, 34 Hun. 121; *Child v. Chappell*, 9 N. Y. 246; *Trustees v. Cowen*, 4 Paige, 510; *Jaques v. Nat. Exhibit Co.*, 15 Abb. N. Cas. 250; *Rigney v. Chicago*, 102 Ill. 64; *City of Chicago v. Union, etc., Ass'n*, 102 Ill. 379; *Rensselaer v. Leopold*, 106 Ind. 30; *Grafton v. B. & O. R. R. Co.*, 21 Fed. Rep. 309; *Railroad Co. v. Schurmeier*, 7 Wall. (U. S.) 272; *City of Denver v. Bayer*, 7 Col. 113; *Everett v. Marquette*, 53 Mich. 450. See, also, "An Abutter's Rights in a Street," 24 Cent. L. J. 51, and authorities cited in the following note.

<sup>4</sup> *Transsylvania University v. Lexington*, 3 B. Mon. (Ky.) 25, S. C. 38

Am. Dec. 173; *Common Council v. Croas*, 7 Ind. 9; *Ross v. Thompson*, 78 Ind. 90, 94; *City of Indianapolis v. Kingsbury*, 101 Ind. 200, 211; *LeClerc v. Gallipolis*, 7 Ohio, 217; *St. R'y v. Cummins*, 14 Ohio St. 523; *Crawford v. Delaware*, 7 Ohio St. 469; *State v. Berdetta*, 73 Ind. 185, S. C. 38 Am. Rep. 117; *St. Vincent's Asylum v. Troy*, 76 N. Y. 108, S. C. 32 Am. Rep. 286; *Brakken v. Minneapolis, etc., R'y Co.*, 29 Minn. 41; *Lackland v. North Mo. R. R. Co.*, 31 Mo. 180; *State v. Laverack*, 34 N. J. L. 201; *McCaffrey v. Smith*, 41 Hun. 117; *Broome v. N. Y., etc., Tel. Co.*, 7 Atl. Rep. 851; *Lahr v. Metropolitan, etc., R. R. Co.*, 104 N. Y. 268; *Jeffersonville, etc., R. R. Co. v. Esterle*, 13 Bush. (Ky.) 667, S. C. 17 Am. R'y Rep. 111.

<sup>5</sup> *Story v. N. Y. Elevated R. R. Co.*, 90 N. Y. 122, 146.

ment, for which the abutter is entitled to compensation.<sup>1</sup> Upon the ground that the easement of access "is a valuable property right of which the owner can not be divested except when taken for public use and after due compensation," it was held by the Supreme Court of Ohio, in a case recently decided, that a hackney-coach stand in a public street, materially impairing the right of access of the adjoining proprietor, is a nuisance and can not be justified by an ordinance of the city permitting and attempting to authorize its establishment.<sup>2</sup> The court held that the ordinance was invalid and the stand unlawful both because the use was for a private purpose and because, whether private or public, the adjoining owner could not be deprived of access to his premises without due compensation. A similar ruling was made in New York, in a case where a liveryman left his vehicles on the street in front of another's premises, the court, in the course of the opinion, saying: "The legislature had not the power, neither had the municipal authorities, *as against the adjoining owner*, to confer upon any person the right to make use of the highway for any other purpose than to pass and repass."<sup>3</sup> These cases seem to us well founded in principle. Municipal corporations often enact ordinances setting apart certain places for coaches, hacks, or express wagons to stand, and the validity of such ordinances does not seem often to have been questioned. We think, however, that while the general public may have no lawful cause to complain in ordinary cases, yet where such stands are in front of private property and deprive the owner of access thereto, or seriously interfere therewith, such owner has just cause to complain and may success-

<sup>1</sup> *Lahr v. Metropolitan Elevated R. R. Co.*, 104 N. Y. 268, 288; *Story v. N. Y. Elevated R. R. Co.*, 90 N. Y. 122; *Mahady v. Bushwick R. R. Co.*, 91 N. Y. 148, 153; *Drucker v. Manhattan R'y Co.*, 106 N. Y. 157, S. C. 60 Am. Rep. 437. See, also, *Cohen v. Cleveland*, 43 Ohio St. 190, S. C. 9 Am. & Eng. Corp. Cas. 405.

<sup>2</sup> *Branahan v. Hotel Co.*, 39 Ohio St. 333, S. C. 48 Am. Rep. 457.

<sup>3</sup> *McCaffrey v. Smith*, 41 Hun. 117.

So, in New Jersey, an abutting owner was held entitled to an injunction prohibiting teamsters from congregating with their horses and wagons in front of his premises and there remaining and acting so as to make his home unpleasant and uncomfortable. The court also held that the motive of the complainant in prosecuting the suit was immaterial. *Lippincott v. Lasher*, 44 N. J. Eq. 120, S. C. 39 Alb. L. Jour. 84.

fully attack the validity of the ordinance attempting to authorize the establishment of the stand.

According to the weight of authority, where the fee is in the abutting land owner, the appropriation of a street for the use of a steam railway is a new and additional burden for which the abutter is entitled to compensation, especially if it deprives him of the right of access to his premises.<sup>1</sup> As said by Judge Cooley, "It is not usual for such a road to be laid in one of the public highways, and the cases in which it is permitted are exceptional. For that reason, therefore, if for no other, the owner whose land is taken for a highway, whether in town or country, can not be understood to have assented to its being appropriated, either wholly or in part, to railway purposes at the discretion of the public authorities, and to have been compensated for such appropriation. Neither can the use of the highway for the ordinary railway be in furtherance of the purpose for which the highway is established, and a relief to the local business and travel upon it; the two uses, on the other hand, come seriously in conflict; the railroad constitutes a perpetual embarrassment to the ordinary use, which is greater or less in proportion to the business that is done upon it and the frequency of trains. When, therefore, the country highway or the city street is taken for the purposes of a railroad company engaged in the business of transporting persons and property between distant points, the owner of the soil in the highway is

<sup>1</sup> *Adams v. Chicago, etc., Co.* (Minn.), 39 N. W. R. 629; *Ruttles v. Covington* (Ky.), 10 S. W. R. 644; *Theobald v. Louisville, etc., Co.* (Miss.), 6 So. R. 230; *Enos v. Chicago, etc., Co.* (Ia.), 42 N. W. R. 575; *Imlay v. Union Branch R. R. Co.*, 26 Conn. 249, S. C. 68 Am. Dec. 392; *Williams v. N. Y. Cent. R. R. Co.*, 16 N. Y. 97; *Henderson v. N. Y. Cent. R. R. Co.*, 78 N. Y. 423; *Mahon v. N. Y. Cent. R. R. Co.*, 24 N. Y. 658; *Gray v. St. Paul, etc., R. R. Co.*, 13 Minn. 315; *Southern Pac. R. R. Co. v. Reed*, 41 Cal. 256; *St. Paul, etc., R. R. Co. v. Schurmeier*, 10 Minn. 82, S. C. 7 Wall. 272; *Starr v. Camden, etc., R. R. Co.*, 24 N. J. (4 Zab.) 592; *State v. Laverack*, 34 N. J. L. (5 Vroom) 201; *Harrison v. New Orleans, etc., R'y Co.*, 34 La. Ann. 462; *Cox v. Louisville, etc., R. R. Co.*, 48 Ind. 178; *Terre Haute, etc., R. R. Co. v. Scott*, 74 Ind. 29; *South Carolina R. R. Co. v. Steiner*, 44 Ga. 546; *Ford v. Chicago, etc., R. W. Co.*, 14 Wis. 616; *Jones v. Keith*, 37 Tex. 394; *Cape Girardeau, etc., Co. v. Renfroe*, 58 Mo. 265; *Grand Rapids, etc., R. R. Co. v. Heisel*, 47 Mich. 393; *Indianapolis, etc., R. R. Co. v. Hartley*, 67 Ill. 439, S. C. 16 Am. Rep. 624.

entitled to compensation, because a new burden has been imposed upon his estate, which affects him differently from the original easement, and may be specially injurious."<sup>1</sup> The contrary has, however, been held by some of the courts,<sup>2</sup> and by some a distinction is drawn against an abutter who does not own the fee of the highway.<sup>3</sup> But, in any case, whether he owns the fee or not, we think he is entitled to compensation where the railroad deprives him of his right of access.<sup>4</sup>

In the case of street or horse railways, which do not seriously interfere with the abutter's right of access, a different rule applies. They are not regarded as a new and different use of the street, but are considered as an improved means of travel in furtherance of the ordinary use of the highway, and not as an impediment thereto. "When land is taken or dedicated for a town street, it is unquestionably appropriated for all the ordinary purposes of a town street; not merely the purposes to which such streets were formerly applied, but those demanded by new

<sup>1</sup>Grand Rapids, etc., R. R. Co. v. Heisel, 38 Mich. 62, S. C. 31 Am. Rep. 306, 310. See, also, Indianapolis, etc., R. R. Co. v. Hartley, 67 Ill. 444, S. C. 16 Am. R. 624; Springfield v. Conn., etc., R. R. Co., 4 Cush. 63, Cooley's Const. Lim. (3d ed.), 683. The foundation for the easement of access which remains in the abutting owner is a secure one, for the foundation is the principle that the owner has a right in the highway distinct from that of the public. Burkham v. Ohio, etc., R. R. Co. (Ind.), 23 N. E. R. 799; Town of Rensselaer v. Leopold, 106 Ind. 29.

<sup>2</sup>Struthers v. Dunkirk, etc., R. R. Co., 87 Pa. St. 282, S. C. 7 Cent. L. J. 213; *In re Phila.*, etc., R. R. Co., 6 Whart. 25; Peddicord v. Baltimore, etc., R. R. Co., 34 Md. 463; Morris, etc., R. R. Co. v. Newark, 2 Stockt. (N. J.) 352; Whittier v. Portland, etc., R. R. Co., 38 Me. 26; Lexington, etc., R. R. Co. v. Applegate, 8 Dana, 294, 302. This doctrine is approved in *Pierce on Railroads*, 234, 238.

<sup>3</sup>People v. Kerr, 27 N. Y. 188, Carson v. Central R. R. Co., 35 Cal. 325; Atchison, etc., R. R. Co. v. Garside, 10 Kan. 552; Milburn v. Cedar Rapids, etc., R. R. Co., 12 Ia. 246; Grand Rapids, etc., R. R. Co. v. Heisel, 38 Mich. 62, S. C. 31 Am. R. 306; Stetson v. Chicago, etc., R. R. Co., 75 Ill. 74; Moses v. Pittsburgh, etc., R. R. Co., 21 Ill. 522.

<sup>4</sup>Elizabeth, etc., R. R. Co. v. Combs, 10 Bush. (Ky.) 382, S. C. 19 Am. Rep. 67; Stone v. Fairbury, etc., R. R. Co., 68 Ill. 394; Protzman v. Indianapolis, etc., R. R. Co., 9 Ind. 467; City of Denver v. Bayer, 7 Col. 113, S. C. 2 Am. & Eng. Corp. Cas. 465; Lackland v. North Mo. R. R. Co., 31 Mo. 180; Scioto Valley R. R. Co. v. Lawrence, 38 Ohio St. 41, S. C. 7 Am. & Eng. R. R. Cas. 93; Dixon v. Baltimore, etc., R. R. Co., 1 Mackey, 78, S. C. 3 Am. & Eng. R. R. Cas. 201; *Pierce on Railroads*, 241. And see authorities cited in note 1, *ante* 528.

improvements and new wants. Among these purposes is the use for carriages which run on a grooved track ; and the preparation of important streets in large cities for their use is not only a frequent necessity, which must be supposed to have been contemplated, but it is almost as much a matter of course as the grading and paving."<sup>1</sup> The abutter is not, therefore, even though he owns the fee, entitled to additional compensation where a horse railway is constructed in a street.<sup>2</sup> But if the railway be so constructed and used as to constitute a nuisance and a special injury to the abutter, he will be entitled to damages.<sup>3</sup>

It has been held by the Supreme Court of Minnesota that an ordinary steam railroad in a street is an additional burden, not because steam is the motive power, but because it monopolizes the street and virtually excludes the general public from its legitimate use ; and that the construction of a street railway for passengers may be authorized in a city street without compensation to adjacent land owners, although the railway is operated by steam motors and is used also to transport passengers for miles outside the city limits.<sup>4</sup> It is doubtless true that the character of the motor will not necessarily determine the character of the use in every case ; but it is certainly an important ele-

<sup>1</sup> Cooley's Const. Lim., 556. Approved in *Eichels v. Evansville St. R'y*, 78 Ind. 261, 268.

<sup>2</sup> *Elliott v. Fair Haven, etc.*, R. R. Co., 32 Conn. 579; *Hinchman v. Patterson Horse R. R. Co.*, 17 N. J. Eq. 75; *Jersey City, etc., R. R. Co. v. Jersey City Horse R. R. Co.*, 20 N. J. Eq. 61; *Cincinnati, etc., St. R'y Co. v. Cummins ville*, 14 Ohio St. 523; *Hobart v. Milwaukee R'y Co.*, 27 Wis. 194; *Eichels v. Evansville St. R'y Co.*, 78 Ind. 261; *Att'y General v. Metropolitan R'y Co.*, 125 Mass. 515, S. C. 28 Am. R. 264; *Brown v. Duplessis*, 14 La. Ann. 842; *Savannah, etc., R. R. Co., v. Mayor*, 45 Ga. 602; *Hiss v. Baltimore, etc., R'y Co.*, 52 Md. 242, S. C. 36 Am. R. 371; *Texas, etc., R. R. Co. v. Rose-dale*, 64 Tex. 80, S. C. 22 Am. & Eng. R. R. Cas., 160; *Randall v. Jackson-*

*ville St. R'y Co.*, 19 Fla. 409, S. C. 17 Am. & Eng. R. R. Cas., 184. *Contra*, *Craig v. Rochester, etc.*, R. R. Co., 39 N. Y. 404; *People v. Kerr*, 27 N. Y. 188.

<sup>3</sup> *Mahady v. Bushwick R. R. Co.*, 91 N. Y. 148, S. C. 43 Am. Rep. 661; *Carli v. Stillwater St. R'y Co.*, 28 Minn. 373, S. C. 41 Am. Rep. 290. See, also, as to the liability of a company so operating a steam railroad that it constitutes a nuisance, *Penna. R. R. Co. v. Angel*, 41 N. J. Eq. 316, S. C. 56 Am. Rep. 1; *Baltimore, etc., R. R. Co. v. Fifth Baptist Church*, 108 U. S. 317; *Central Branch U. P. R. R. Co. v. Twine*, 23 Kan. 585, S. C. 33 Am. R. 203.

<sup>4</sup> *Newell v. Minneapolis, etc., R'y Co.*, 35 Minn. 112, S. C. 59 Am. Rep. 303, *Mitchell, J., dissenting.*

ment in the consideration of that question. Steam and electricity are apt to be much more dangerous than horse power to ordinary travel. The tendency of the courts, however, has been to continually extend the right to use new and improved vehicles and means of locomotion so that it has now become very difficult to draw the line between uses which constitute an additional servitude and those which do not. It is difficult for us to resist the conviction that the rights of the owners of the fee are unjustly impaired and abridged by the rule which some of the decisions sanction, for it is undeniably true that one who lays out a public way anticipates nothing more than the use of it in the ordinary modes of travel, and if the new mode adopted is more burdensome and is materially different from the one prevailing at the time the way was laid out, it is not easy to find any just reason for declaring that the owner assented to the use of the way in the new and unusual mode. It can not, without a great stretch, be said that a property owner assented to a thing he did not anticipate. At all events it can not be held, without a departure from principle, that he is not entitled to compensation where the new use does impair the free access and egress to and from his property; that is a substantial right, which, as is so generally known as to be matter of judicial knowledge, gives a peculiar value to abutting property.

Where, as is ordinarily the case, the legislature delegates to a municipal corporation the control of streets and alleys, a railroad track can not be laid in any of such public ways without the consent of the municipal authorities. The legislature may, by virtue of the paramount authority which it has over public ways, directly grant a railroad company the right to lay its tracks in the streets of an incorporated town or city, but it is seldom that the legislature assumes the right to directly exercise this paramount authority. Where the control of streets and alleys is delegated to a municipal corporation it may, within limits, impose such conditions and terms upon a railroad company that it licenses to use its streets as it deems just and expedient. The conditions of the grant, if accepted, bind the company, and the license confers the full privilege of occu-



pancy in so far as the rights of the municipality extend.<sup>1</sup>

In granting a right to occupy a street by a railroad track, a municipal corporation exercises a delegated governmental power and for the bare exercise of such a power is not liable to abutting owners.<sup>2</sup> It is evident that the exercise of a governmental power can not, of itself, subject the municipality to a private action, but if the municipal corporation should join the railroad company in doing an act which would so impair the easement of access or so injure the abutting property as to cause the property owner special damages, then, it may be that the owner could maintain his action for damages. Where, however, no more is done than the enactment of an ordinance granting the privilege of occupancy, it seems quite clear that no private action would lie against the municipality for damages.

It is not to be forgotten that there is an essential and an inherent difference between the private proprietary rights of the abutting owner and the rights of the public as represented by the municipality. The municipal authorities can not transfer rights which the municipality does not possess, and the easement of access is a private right entirely distinct from that of the public. As the easement of access is a private right, it remains in the owner and does not pass under a grant of the right of occupancy made by the municipal corporation. The owner of an abutting lot injured by the construction of a railroad track in the street may recover compensation from a railroad company, notwithstanding the grant of the right of occupancy by the municipal authorities. This conclusion results from the principle we have often stated, that there is a private right in a public way which can not be taken without compensation. Where, however, as it has been held, it affirmatively appears that no injury has resulted from the construction of a railroad track in a street there can be no recovery, since if

<sup>1</sup>City of Burlington v. Burlington, etc., Co., 49 Ia. 144, S. C. 31 Am. R. 145. It is, however, doubtful whether the case cited does not carry the doctrine too far.

<sup>2</sup>Burkham v. Ohio, etc., Co. (Ind.) 23 N. E. R. 799; Port of Mobile v. Railroad Co., 84 Ala. 115, S. C. 5 Am. St. R. 342.

there is no injury there is no taking within the meaning of the law.<sup>1</sup>

A railroad company is not protected against negligence in the operation of its road by the fact that it has paid the abutting owner compensation for the additional burden imposed upon his land, for if it so negligently and wrongfully operates its road as to cause him special injury it may be compelled to respond in damages. There is a distinction between actions to recover compensation for the additional burden imposed upon the land and actions to recover for injury resulting from the negligent or wrongful operation of the railroad.<sup>2</sup>

A land owner who consents to the occupancy of a street in front of his property can not maintain an action for damages for an appropriation of his property, but if the company so negligently and wrongfully operates its railroad as to cause him special injury he may recover, notwithstanding his consent to the use of the street for railroad purposes. The consent to use the street may be by parol, and when it has been acted upon it is irrevocable.<sup>3</sup> It is not to be inferred, however, from what we have said, that injury necessarily resulting from a reasonably careful and proper operation of a railroad will give a right of action; on the contrary it is only where there is negligence or some culpable wrong that an action will lie.

The use of the telephone and the telegraph is so far a public convenience and necessity that property may be condemned therefor under the power of eminent domain,<sup>4</sup> but whether the erection of telegraph or telephone poles and lines upon a highway is an additional burden for which the owner of the fee is entitled to compensation is a vexed question of no little importance. The Supreme Court of Massachusetts<sup>5</sup> and the Supreme

<sup>1</sup>The Indianapolis, etc., Co. v. Eberle, 110 Ind. 542; Burkham v. Ohio, etc., Co. (Ind.), 23 N. E. R. 799.

<sup>2</sup>White v. The Chicago, etc., R. R. Co. (Ind.), 23 N. E. R. 782.

<sup>3</sup>Wolf v. Covington, etc., Co., 15 B. Mon. 404; Marble v. Whitney, 28 N. Y. 297; Murdock v. Prospect Park, etc., Co., 10 Hun. 598; People v. Goodwin,

5 N. Y. 568; Burkham v. Ohio, etc., Co. (Ind.), 23 N. E. R. 799.

<sup>4</sup>State v. Am., etc., Co., 43 N. J. L. 381; Pierce v. Drew, 136 Mass. 75, S. C. 49 Am. Rep. 7; New Orleans, etc., R. R. Co. v. Southern, etc., Tel. Co., 53 Ala. 211; Pensacola Telegraph v. Western Union Telegraph, 96 U. S. 1.

<sup>5</sup>Pierce v. Drew, 136 Mass. 75, S. C. 49 Am. Rep. 7.

Court of Missouri<sup>1</sup> are the only courts, so far as we have been able to ascertain, that have held such a use not an additional burden and have refused to allow the adjoining owner compensation therefor. The authority of these cases is weakened by the fact that they were each decided by a divided court. The majority based their decisions upon the ground that the courts had before construed statutes granting rights to such companies and costly telegraphic structures had been erected in the highways for years without any suggestion even that the rights of abutters had been invaded, so that it would require a very clear case to justify the court in setting aside a statute upon the subject as unconstitutional, and that no such case was presented; that when land is taken for a highway it is taken not only for the purpose of passing and repassing, but also for the transmission of intelligence between the points connected thereby; that new and improved modes of travel and of transmitting intelligence must be presumed to have been contemplated as well as those in existence when the way was established; and that the use of highways for the purpose of transmitting telegraphic and telephone messages is justifiable upon the same principles that their use for sewers, gas pipes and street railways is justifiable. On the other hand it is held by the Supreme Court of Illinois<sup>2</sup> that the use of a highway for telephone or telegraph poles and lines is similar in character to its use for a steam railroad, and constitutes an additional servitude for which the owner of the fee is entitled to compensation. A number of courts have expressly so decided,<sup>3</sup> and others have approved this doctrine in general terms.<sup>4</sup> We are inclined to the opinion that such a use constitutes a new burden, for which the

<sup>1</sup> *Julia Building Ass'n v. Bell Tel. Co.*, 88 Mo 258.

<sup>2</sup> *Board of Trade Tel. Co. v. Barnett*, 107 Ill 507, S. C. 47 Am. Rep. 453.

<sup>3</sup> *Dusenbury v. Mutual Tel.*, 11 Abb. N. Cas. 440; *Metropolitan, etc., Co. v. Caldwell Lead Co.*, 67 How. Pr. 365; *Smith v. Central, etc., Tel. Co.*, 2 Ohio Circ. Ct. 259, (quoted in 28 Am. E. Reg. (N. S.) 68); *Willis v. Erie, etc., Co.*, 37 Minn. 347 (by a divided court);

*Atlantic, etc., Tel. Co. v. Chicago, etc., R. R. Co.*, 7 Biss. 158; *American Tel., etc., Co. v. Smith (Md.)*, 18 Atl. Rep. 910.

<sup>4</sup> *Clauser, etc., Brewing Co. v. Baltimore and Ohio Tel. Co.*, 17 Chic. Leg. News, 22, *per* Von Brunt, J.; *Broome v. N. Y., etc., Tel. Co. (N. J.)*, 7 Atl. Rep. 851. See, also, *People v. Squire*, 107 N. Y. 593, S. C. 1 Am. St. Rep. 893.

owner of the fee is entitled to compensation. In addition to the authorities already cited in support of this doctrine, we think it is sustained by those cases holding the construction of a steam railroad in a highway an additional burden, and especially by the New York elevated railroad cases. There are also analogous cases holding that the construction of a telegraph line along the right of way of a railroad is a taking of the company's property for which it is entitled to compensation.<sup>1</sup> By the older authorities it was held that "the owner of the soil has a right to all above and under ground, except only the right of passage for the king and his people." It was afterwards held that the public right included the incidental right of preparing the way for travel and keeping it in repair. Then, as necessity seemed to demand, this right was enlarged, and it was held that the owner in dedicating the way, or the authorities in establishing it, must be presumed to have contemplated its use for improved means of travel. This, as a matter of fact, is, in most cases a very violent presumption, but to presume that the use of our highways by telegraph or telephone companies was contemplated when they were established, does still more violence to the facts. Such a use bears a very remote analogy to their use for passage and repassage. If one or two posts and wires may be placed in front of a man's property, may not a dozen be placed there? Indeed, in most of our cities the poles and wires are already so thick as to seriously interfere with the light and air and to greatly impair the chances of saving a building in case of fire. Has the owner no remedy in such a case? Where shall the line be drawn? As a matter of fact, such injuries are never taken into consideration in assessing damages for a highway, yet they are by no means trifling. If they were, it would be impossible to tell in advance how great they would be, for the highway might be used for one or a dozen lines, or for none at all. The abutting owner is specially benefited by drains and sewers and by gas-mains, but this is not true of telegraph lines; and so far from facilitating

<sup>1</sup> *Southwestern R. R. Co. v. South- Co. v. Rich*, 19 Kan. 517, S. C. 27 Am. ern, etc., Tel. Co., 46 Ga. 43, S. C. 12 Rep. 159. Am. Rep. 585; *Western Union Tel.*

travel, they rather impede it and interfere with the ordinary use of the way.<sup>1</sup> The truth is, the opposite doctrine is founded upon expediency rather than upon principle.

As owner of the fee, subject only to the public easement, the abutter has all the ordinary remedies of the owner of a freehold.<sup>2</sup> He may maintain trespass against one who unlawfully cuts and carries away the grass, trees or herbage,<sup>3</sup> and even against one who stands upon the sidewalk in front of his premises and uses abusive language towards him, refusing to depart.<sup>4</sup> And one who, without lawful authority, destroys and reconstructs a highway is a trespasser, although he makes a new way upon his own premises equally safe and convenient.<sup>5</sup> The abutter may also maintain ejectment against a railroad company which has placed its track upon his side of a street without paying or tendering damages therefor,<sup>6</sup> or against an individual who has wrongfully and unlawfully encroached thereon.<sup>7</sup>

<sup>1</sup>The right of a municipal corporation to compel a telegraph company to place its wires under ground was passed upon in a recent case; the court sustained the authority of the municipality upon the ground that it was a valid exercise of the police power. *Western Union Tel. Co. v. New York*, 38 Fed. R. 532, S. C. 6 Railroad and Corporation Journal, 105.

<sup>2</sup>3 Kent's Comm. 432; Angell on Highways, section 319; *Goodtitle v. Alker*, 1 Burr. 133.

<sup>3</sup>*Adams v. Emerson*, 6 Pick. 57; *Robbins v. Borman*, 1 Pick. 122; *Cole v. Drew*, 44 Vt. 49, S. C. 8 Am. Rep. 363; *Chambers v. Furry*, 1 Yeates, 167; *Cooley on Torts*, 318; *Clark v. Dasso*, 34 Mich. 86; *Baker v. Shepherd*, 24 N. H. 208.

<sup>4</sup>*Adams v. Rivers*, 11 Barb. 390. Compare, *O'Linda v. Lothrop*, 21 Pick. 292, and see *Stimson v. Gardiner*, 42 Me. 248.

<sup>5</sup>*Hunt v. Rich*, 38 Me. 195; *Ruggles v. Lesure*, 24 Pick. 187. See, also, *Weathered v. Bray*, 7 Ind. 706.

<sup>6</sup>*Terre Haute, etc., R. R. Co. v. Roddel*, 89 Ind. 128.

<sup>7</sup>*Goodtitle v. Alker*, 1 Burr. 133; *Peck v. Smith*, 1 Conn. 103; *Cooper v. Smith*, 9 Serg. & R. 26; *Alden v. Murdock*, 13 Mass. 256; *Locks and Canals v. Nashua, etc., R. R. Co.*, 104 Mass. 1; *Bissell v. N. Y. Cent. R. R. Co.*, 23 N. Y. 61; *Jersey City v. Fitzpatrick*, 30 N. J. Eq. 97; *Perry v. New Orleans, etc., R. R. Co.*, 55 Ala. 413, S. C. 28 Am. Rep. 740. It has been held in many cases that the owner may lose his right to maintain a suit for an injunction or an action for ejectment, although he may not be precluded from maintaining an action for damages. This rule rests upon public policy, the courts holding that the public have such an interest in the maintenance and operation of a railroad as precludes a private individual from enjoining the operation of the road or from preventing its operation by ousting the company from land occupied by its track. *Western, etc., Co. v. Johnston*, 59 Pa. St. 290; *Smart v. Portsmouth, etc., Co.*, 20 N. H. 233; *Harrington v.*

This has been doubted by no less an authority than the Supreme Court of the United States,<sup>1</sup> but it is clearly right upon principle and is now settled by the great weight of authority.<sup>2</sup> Where special damages are alleged and proved he may also maintain an action to abate a nuisance,<sup>3</sup> but no such action can be maintained in the absence of special damages.<sup>4</sup> Injunction will also lie at the suit of the abutter, in a proper case. Thus, it will lie to prevent the deprivation of his right of access,<sup>5</sup> and it is a general rule that wherever adjoining proprietors are entitled to compensation for their interest in a street appropriated

St. Paul, etc., 17 Minn. 215; Maxwell v. Bay City Bridge Co., 41 Mich. 453; The Indiana, etc., Co. v. McBroom, 114 Ind. 198; Midland, etc., Co. v. Smith, 113 Ind. 233; Easton v. New York, etc., Co., 26 N. J. Eq. 359; Binney's Case, 2 Bland's Ch. (Md.) 99.

<sup>1</sup>City of Cincinnati v. White, 6 Peters, 431.

<sup>2</sup>Sedg. & Wait. on Trial of Title to Land, sections 132, 135; Carpenter v. Oswego, etc., R. R. Co., 24 N. Y. 655; West Covington v. Freking, 8 Bush. 121; Read v. Leeds, 19 Conn. 188, and authorities cited in note, *supra*.

<sup>3</sup>Schulte v. N. & P. etc., Co., 50 Cal. 592; Fritz v. Hobson, 19 Am. L. Reg. (N. S.) 615, and note; Danville, etc., Gravel Road Co. v. Campbell, 87 Ind. 57; Stratton v. Elliott, 83 Ind. 425; Herbert v. Benson, 2 La. Ann. 770; Vandersmith's Case, 10 Pa. Law Jour. 523.

<sup>4</sup>Matlock v. Hawkins, 92 Ind. 225; Bidinger v. Bishop, 76 Ind. 244; Indianapolis, etc., R. R. Co. v. Eberle, 110 Ind. 542; Sunderland v. Martin, 113 Ind. 411; Mayhew v. Norton, 17 Pick. 357, S. C. 28 Am. Dec. 300; Bigley v. Numan, 53 Cal. 403; Wood on Nuis., section 655.

<sup>5</sup>Carter v. City of Chicago, 57 Ill. 283. See, also, Le Clercq v. Gallipolis, 7 Ohio, Pt. 1, 218; Palmer v. Waddell, 22 Kan. 352; Atchison, etc., R. R. Co.

v. Nave (Kan.), 17 Pac. Rep. 587; Prime v. Twenty-third St. R'y Co., 1 Abb. N. Cas. 63; Schaidt v. Blaul, 66 Md. 141. So, the unlawful removal of fences and shade trees may be enjoined. Tainter v. Mayor, 19 N. J. Eq. 46; Winslow v. Nayson, 113 Mass. 411; Wilder v. DeCou, 26 Minn. 10; De Witt v. Van Schoyk, 110 N. Y. 7; Price v. Knott, 8 Ore. 438; City of Chicago v. Union, etc., Co., 102 Ill. 379; Town of Burlington v. Schwarzman, 52 Conn. 181. An abutting owner may maintain injunction to prevent the unlawful destruction of his right of ingress and egress, and he is not bound to wait until the damages have actually accrued. Ross v. Thompson, 78 Ind. 90, 96. The purchaser of lots who has relied upon the grantor's representation that a street would be extended as represented on a plat may maintain an injunction to prevent a defendant claiming under the same grantor from obstructing the proposed extension by erecting a building thereon. Karrer v. Berry, 44 Mich. 391. Ordinarily the injury from an unlawful interference with the rights of an abutter is to be redressed in a suit brought by each owner, but there are cases in which all who are injured by the same wrong may join in a suit for injunction. Pettibone v. Hamilton, 40 Wis. 402; Town of Sullivan v. Phillips, 110 Ind. 320.

by a railway company, an injunction will be granted to prevent such appropriation until compensation is made.<sup>1</sup> But the right to maintain an injunction may be lost by such laches as will work an estoppel.<sup>2</sup> And it has been held that where the municipality owns the fee, a railroad company will not be enjoined, at the suit of an abutting owner, from properly constructing its track in the street under municipal authority.<sup>3</sup>

<sup>1</sup> *People v. Law*, 34 Barb. 494; *High on Inj.*, section 399; *Kavanagh v. Mobile, etc., R. R. Co. (Ga.)*, 4 S. E. Rep. 113; *Colstrum v. Minneapolis, etc., R. R. Co.*, 33 Minn. 516; *Scioto Valley R. Co. v. Lawrence*, 38 Ohio St. 41.      also, *Indianapolis, etc., R. R. Co. v. Calvert*, 110 Ind. 555.

<sup>2</sup> *Sunderland v. Martin*, 113 Ind. 411; *High on Inj.*, sections 388, 389. See,      <sup>3</sup> *Mills v. Parlin*, 106 Ill. 60. See, also, *Heath v. Des Moines, etc., R. R. Co.*, 61 Ia. 11; *Truesdale v. Grape Sugar Co.*, 101 Ill. 561; *Smith v. Point Pleasant, etc., R. R. Co.*, 23 W. Va. 451.

## CHAPTER XXVII.

### LIABILITIES OF ABUTTERS.

In the absence of any legislative enactment upon the subject an abutting land owner is not liable to travelers for injuries received by them because of a defect in the street in front of his premises unless such defect was caused by his own act or fault.<sup>1</sup> But where both the city and the adjoining owner are required by statute to keep the sidewalk in repair, some of the courts have held that there is a joint and several liability.<sup>2</sup> It has been held, however, that a city charter providing that "owners shall be liable for all damages, to whomsoever resulting, from their default or evident neglect in not keeping such sidewalk in good repair and in safe passable condition," is unconstitutional, in so far as it assumes to make the adjoining owner liable to others than the city; for injuries caused by the failure to keep the sidewalk in repair.<sup>3</sup> And the rule is general, that,

<sup>1</sup>Jansen v. Atchinson, 16 Kan. 358; Weller v. McCormick, 47 N. J. L. 397, S. C. 11 Am. & Eng. Corp. Cas. 537; City of Elkhart v. Wickwire, 87 Ind. 77; Moore v. Gadsden, 87 N. Y. 84, S. C. 41 Am. Rep. 352; Wenzlick v. McCotter, 87 N. Y. 122, S. C. 41 A. Rep. 358; Eustace v. Johns, 38 Cal. 3; Robbins v. Jones, 15 C. B. (N. S.), 221, 243. Compare, Ryan v. Wilson, 87 N. Y. 471; Morton v. Smith, 48 Wis. 265, S. C. 33 Am. Rep. 811.

<sup>2</sup>Peoria v. Simpson, 110 Ill. 294, S. C. 5 Am. & Eng. Corp. Cas. 616, S. C. 51 Am. Rep. 683. So, both a city and a railroad company which uses the streets for its tracks may be bound to repair. Philadelphia v. Weller, 4 Brewster

(Pa.), 24. So, where two towns are required to keep a bridge in repair. Day v. Day, 94 N. Y. 153. But there is much reason for doubting whether a public duty can be placed upon a private citizen, and it is quite clear that the principle in the cases last cited does not fully apply to a citizen who makes no special use of the street. It is no doubt true that the abutter may be compelled to pay his proportion of the expense of repairing, but whether he can be compelled to keep a particular part of a way in repair or answer in damages to a stranger is by no means so clear.

<sup>3</sup>Noonan v. Stillwater, 33 Minn. 198, S. C. 7 Am. & Eng. Corp. Cas. 111.



where a city is bound to repair, the abutting owner is not liable for injuries caused by defects arising from a failure to repair.<sup>1</sup> Where a land owner sold a lot and agreed to build a walk therefrom to the street, which he did, it was held that he was not liable to the purchaser for injuries sustained by the latter in slipping off of the walk while it was covered with snow and ice, although it was only two planks in width, because no common law duty rested upon the owner to construct and maintain such a walk, and because if there was any contract obligation upon his part to do so it had been performed.<sup>2</sup>

Where the owner makes excavations in a street or sidewalk, places obstructions thereon, or otherwise renders it dangerous to passers by, he is, in the absence of contributory negligence, liable to them for an injury resulting therefrom.<sup>3</sup> And if the municipality has been compelled to pay damages for such injury, it may recover over from the adjoining owner by whose fault the injury was occasioned, unless as to such person the corporation is itself a wrong-doer.<sup>4</sup>

So far has this doctrine been carried that an adjoining owner has been held liable for personal injuries caused by the break-

<sup>1</sup> *Keokuk v. Independent Dist. of Keokuk*, 53 Ia. 352, S. C. 36 Am. Rep. 226; *Kirby v. Boylston Market Co.*, 14 Gray, 249; *Flynn v. Canton Co.*, 40 Md. 312, S. C. 17 Am. Rep. 603; *Heeney v. Sprague*, 11 R. I. 456, S. C. 23 Am. Rep. 502; *Eustace v. Johns*, 38 Cal. 3. Nor is he liable for injury to one who falls upon snow and ice which he has failed to remove from in front of his premises, as required by a city ordinance. *Moore v. Gadsden*, 93 N. Y. 12; *Hartford v. Talcott*, 48 Conn. 525; *Flynn v. Canton Co.*, 40 Md. 312, S. C. 17 Am. Rep. 603. Such an ordinance was held unconstitutional in *Gridley v. Bloomington*, 88 Ill. 554. *Contra, In re Goddard*, 16 Pick. 504.

<sup>2</sup> *Fletcher v. Scotten* (Mich.), 41 N. W. Rep. 901.

<sup>3</sup> *Jochem v. Robinson*, 66 Wis. 638; *Garland v. Towne*, 55 N. H. 55; *Chi-*

*cago v. Robbins*, 2 Black. 418; *Severin v. Eddy*, 52 Ill. 189; *Bush v. Johnston*, 23 Pa. St. 209; *Temperance Hall Ass'n v. Giles*, 33 N. J. L. 260, *Ottumwa v. Parks*, 43 Ia. 119; *Congreve v. Morgan*, 18 N. Y. 84; *Irvine v. Wood*, 51 N. Y. 224; *Sexton v. Zett*, 44 N. Y. 430.

<sup>4</sup> *McNaughton v. City of Elkhart*, 85 Ind. 384; *City of Elkhart v. Wickwire*, 87 Ind. 77; *Catterlin v. City of Frankfort*, 79 Ind. 547; *West Boylston v. Mason*, 102 Mass. 341; *Westfield v. Mayo*, 122 Mass. 100; *Rochester v. Montgomery*, 72 N. Y. 65; *Littleton v. Richardson*, 34 N. H. 179; *Norwich v. Breed*, 30 Conn. 535; *Rockford v. Hildebrand*, 61 Ill. 155; *Portland v. Richardson*, 54 Me. 46; *Western & A. R. R. Co. v. Atlanta*, 74 Ga. 774; *Faith v. Atlanta*, 78 Ga. 779, S. C. 4 S. E. R. 3; *Cooley on Torts*, 626.

ing of a flagstone or defective grating covering an excavation under the sidewalk, made, without authority, for his own use,<sup>1</sup> even though it may have been safe in the first instance and afterwards rendered unsafe by lapse of time or the wrongful acts of third persons.<sup>2</sup> If, however, the owner is authorized to maintain such an excavation or coal hole opening into the sidewalk, so that it can not be said to constitute a nuisance, he ought to be held only to the exercise of ordinary and reasonable care and diligence in making and keeping it safe.<sup>3</sup> But even in such a case it is not necessary, in order to charge the owner with notice and negligence, that the defect should be "so notorious as to be evident to all pedestrians passing in the immediate neighborhood."<sup>4</sup>

The owner of a hotel is liable to a traveler who, while exercising due care, falls into an area arranged for lowering trunks into the hotel basement, where the fall is caused by loose or defective fastenings of the rail guarding the area, of which defect the owner has notice.<sup>5</sup> So, the owner of a private passageway opening into a cellar within the limits of a street is liable

<sup>1</sup> *Congreve v. Smith*, 18 N. Y. 79; *Robbins v. Chicago*, 4 Wall. 657, 679; *Nelson v. Godfrey*, 12 Ill. 22; *Gridley v. Bloomington*, 68 Ill. 50; *Gwinnell v. Earner*, 10 L. R. C. P. 658; *City of Portland v. Richardson*, 54 Me. 46, S. C. 89 Am. Dec. 720. The owner must see that the sidewalk is restored to its original safety even where he has permission to excavate under it. *Clifford v. Dam*, 81 N. Y. 52; *Calder v. Smalley*, 66 Ia. 219, S. C. 55 Am. R. 270.

<sup>2</sup> *Congreve v. Morgan*, 18 N. Y. 84, S. C. 72 Am. Dec. 495, and note. Approved by Judge Dillon, 2 Dillon Munic. Corp., section 1033, *n* 1. See, also, *Barry v. Terkildsen*, 72 Cal. 254, S. C. 1 Am. St. Rep. 55. *Contra* *Fisher v. Thirkell*, 21 Mich. 1. Compare *Wolf v. Kilpatrick*, 101 N. Y. 146, S. C. 54 Am. R. 672, where the owner, having obtained permission from the city to excavate under the sidewalk, was held not liable to one who fell through the coal

hole, the cover of which had been broken without the owner's knowledge. As to when the owner may recover over from such third person, see *Churchill v. Holt*, 127 Mass. 165.

<sup>3</sup> *Wolf v. Kilpatrick*, 101 N. Y. 146; *Clifford v. Dam*, 81 N. Y. 52; *Dickson v. Hollister*, 123 Pa. St. 421, S. C. 10 Am. St. Rep. 533.

<sup>4</sup> *Dickson v. Hollister*, *supra*. The rule that notice must be taken of the likelihood of wood, stone and iron being weakened and injured by the action of the elements, or by the wear and tear of time and use, applies quite as forcibly to private persons as to public corporations, and it may be negligence to omit such care and precautions as are necessary to prevent injury from decay caused by time and the wear caused by use.

<sup>5</sup> *Hotel Ass'n v. Walter*, 23 Neb. 280, S. C. 36 N. W. R. 561.

to a traveler thereby injured, notwithstanding the municipality may also be liable under the law.<sup>1</sup> Indeed, it may be stated as a general rule that the adjoining owner is liable to those properly using a highway for injuries caused by any dangerous excavation made by him so near the highway as to render it unsafe.<sup>2</sup> But if the excavation is not so situated or left in such condition as to render the highway unsafe to travelers using ordinary care, there is, as a rule at least, no liability on the part of the land owner.<sup>3</sup> In a case recently decided by the Supreme

<sup>1</sup>*Landru v. Lund*, 38 Minn. 538; S. C. 38 N. W. Rep. 699. Where property had an area along its entire front, without a railing which was required by ordinance, it was held no defense that the injured person fell into the area at a point where the entrance would have been had there been a railing. *McGill v. Dist. of Columbia*, 4 Mackey, 70, S. C. 54 Am. Rep. 256.

<sup>2</sup>*Barnes v. Ward*, 9 C. B. 392; *Hadley v. Taylor*, L. R., 1 C. P. 53; *Beck v. Carter*, 68 N. Y. 283, S. C. 23 Am. R. 175; *Homan v. Stanley*, 66 Pa. St. 464; *Sanders v. Reister*, 1 Dak. 151; *Norwich v. Breed*, 30 Conn. 535; *Stratton v. Staples*, 59 Me. 94. See, also, *Graves v. Thomas*, 95 Ind. 364; *Crogan v. Schiele*, 53 Conn. 186; *Malloy v. Hibernia, etc., Co. (Cal.)*, 21 Pac. R. 525. In *Howland v. Vincent*, 10 Met. 371, the property owner was held not liable for an excavation within less than two feet of the highway, but this case has been condemned as unsound, and, as we think, with justice. *Shearm. & Red. on Neg.*, section 505. It has, however, been approved by the same court in a late case, in which it is intimated that the abutter can in no event be liable at common law, as applied in that court, for not guarding excavations on his own property so as to prevent travelers on the highway from falling into them. The court say that it is the duty of the city in such

a case, to erect barriers at the side of the street. *McIntire v. Roberts*, 149 Mass. 450. An owner who digs an excavation on his own land distant from the highway is not liable to one who sustains an injury by falling into it, unless the injured person was expressly or impliedly invited or allured to the owner's premises. *Binks v. South Yorkshire, etc., Co.*, 3 B. & S. 244; *The Evansville, etc., Co. v. Griffin*, 100 Ind. 221. An owner of land is not liable to an intruder or a trespasser for injury resulting from negligence. *Galveston Oil Co. v. Morton*, 70 Tex. 400, S. C. 8 Am. St. R. 611; *Campbell v. Lunsford*, 83 Ala. 512, S. C. 3 S. R. 522; *Rear-don v. Thompson (Mass.)*, 21 N. E. R. 369. It is otherwise where he invites or allures the injured person to come upon his premises. *Nave v. Flack*, 90 Ind. 200, S. C. 46 Am. R. 205; *Sweeny v. Old Colony, etc., Co.*, 10 Allen, 368; *Bennett v. Railroad Co.*, 102 U. S. 577; *Nichols v. Washington, etc., Co.*, 83 Va. 99, S. C. 5 Am. St. R. 257; *Tomle v. Hampton (Ill.)*, 21 N. E. R. 800.

<sup>3</sup>*Hardcastle v. South Yorkshire R'y Co.*, 6 Hurlst. & Norm. 72; *Gramlich v. Wurst*, 86 Pa. St. 74, S. C. 27 Am. R. 684; *Beck v. Carter*, 68 N. Y. 283, S. C. 23 Am. R. 175; *Binks v. South Yorkshire, etc., Co.*, 3 Best. & S. 244; *Shearm. & Red. on Neg.*, section 359. Whether the excavation is so near as to render travel unsafe has been held

Court of Indiana, it was held that, while the erection of a barbed wire fence by a land owner upon his own property, but along the line of a highway, would not in itself render him liable to one who might sustain an injury therefrom, yet, as the fence in question was maintained in a negligent manner, and the enclosed pasture, on which horses were grazing, enticed horses to enter from the highway, the land owner was liable for an injury to the horse of another which had attempted to cross the fence from the highway on which such horse was lawfully running at the time.<sup>1</sup> And abutting owners have also been held liable for injuries sustained by cattle falling into excavations near the highway.<sup>2</sup>

If the adjoining owner erects a building on his premises near the line of the street, he is bound to take ordinary and reasonable care to prevent it from falling and injuring persons lawfully in the street.<sup>3</sup> And if he leaves a ruinous wall in such condition that it becomes a nuisance, he will be liable to a traveler upon whom it falls.<sup>4</sup> So, where the adjoining owner permitted a telegraph company to suspend wires from his chimney

to be a question for the jury. *Warner v. Holyoke*, 112 Mass. 362. See, also, *Drew v. Sutton*, 55 Vt. 586.

<sup>1</sup>*Sisk v. Crump*, 112 Ind. 504. A barbed wire fence erected by a railroad company along a country road is not necessarily a nuisance. *Hiliyard v. Grand Trunk R'y Co.*, 8 Ont. Rep. 583. See *West v. Ward*, 39 Alb. L. J. 447; *Floaten v. Farrell*, 24 Neb. 347; 38 N. W. R. 732; *Boggs v. Missouri, etc., Co.*, 18 Mo. App. 274; *Atlanta, etc., Co. v. Hudson*, 62 Ga. 679; *Indiana, etc., Co. v. Schertz*, 12 Bradw. (Ill. App.) 304; *Williams v. Mudgett*, 29 Alb. L. J. 23. The rule deducible from the adjudged cases seems to be substantially this: It is not necessarily negligence to use a barbed wire fence, but it should be so used and cared for as not unnecessarily to endanger persons or property. A wire fence is, as the cases indicate, so far different from ordinary fences as to

impose upon those who use them, care and diligence reasonably proportionate to the danger created by their use.

<sup>2</sup>*Jones v. Nichols*, 46 Ark. 207, S. C. 55 Am. Rep. 575; *Haughey v. Hart*, 62 Ia. 96.

<sup>3</sup>*Mullen v. St. John*, 57 N. Y. 569; *Lowell v. Spaulding*, 4 Cush. 277; *Murray v. McShane*, 52 Md. 217, S. C. 36 Am. Rep. 367. If one piles lumber near the line of the street so negligently and improperly that it falls upon and injures a passer-by, an action will lie. *Pastene v. Adams*, 49 Cal. 87. See, upon the general subject, *Maddux v. Cunningham*, 68 Ga. 431; *Mullen v. St. John*, 57 N. Y. 567; *Jager v. Adams*, 123 Mass. 26.

<sup>4</sup>*Church v. Buckhart*, 3 Hill, 193. See *Grogan v. Bradway, etc., Co.*, 87 Mo. 321; *Kappes v. Appel*, 14 Bradw. (Ill. App.) 179; *Gorham v. Groes*, 125 Mass. 232.

causing it to fall into the street, he was held liable therefor.<sup>1</sup> So, where an overhanging sign was blown down.<sup>2</sup> And if the adjoining owner fells a tree, although it may have been growing upon his own land, in such a manner that it falls across the highway and obstructs passage, he will be liable to a traveler for an injury thereby caused to him.<sup>3</sup> So, if he leaves dangerous machinery in an alley for a long time and a child is injured by falling over or against such machinery, the owner will be liable as well as the city.<sup>4</sup> He has no right to store his wagon in the street in front of his premises, and if he keeps it there habitually he will be guilty of maintaining a nuisance.<sup>5</sup>

<sup>1</sup>Gray v. Boston Gaslight Co., 114 Mass. 149, S. C. 19 Am. Rep. 324.

<sup>2</sup>Salisbury v. Herschenroeder, 106 Mass. 458, S. C. 8 Am. Rep. 354. See, also, Garland v. Towne, 55 N. H. 55. So, where an iron lamp hanging over the sidewalk fell on a traveler. Tarry v. Ashton, 1 Q. B. Div. 314, S. C. 45 L. J. Q. B. 260. Upon the same general principle as that asserted in the cases cited in the preceding notes it is held, that if an owner negligently permits snow to accumulate upon the roof of his house and fall upon a person rightfully using the street, he is liable. Smethurst v. Proprietors, etc. (Mass.), 39 Alb. L. J. 163. In all actions of the class under consideration the basis of the right of recovery is negligence, and where there is no negligence there is no cause of action. This is well illustrated by the case of Schell v. Second National Bank, 14 Minn. 43. In that case the owner believed the wall to be safe and he procured its inspection by a competent person who gave it as his judgment that the wall was safe, and it was held that no action would lie against the owner. This decision is a just one, for no property owner is bound to make his buildings absolutely safe; he is exonerated if he does all that a man of ordinary prudence would do under like circumstances. But he does not do his

full duty where he acts upon his own judgment in a case where only a skilled and experienced man can judge correctly, and in such a case it is the duty of the owner to use reasonable care and diligence to secure the assistance and advice of a competent person, for he can not claim immunity upon the ground that he honestly exercised his own judgment, as it may have been carelessness to trust his own unassisted judgment.

<sup>3</sup>Nagle v. Brown, 37 Ohio St. 7. A land owner is not, however, liable for the fall of a rotten limb from a tree maintained on the sidewalk in front of his premises by the city. Weller v. McCormick, 47 N. J. L. 397, S. C. 54 Am. Rep. 175.

<sup>4</sup>Osage City v. Larkin, 40 Kan. 206, S. C. 10 Am. St. Rep. 186. The principle underlying the doctrine of this case is a familiar one. Railroad Co. v. Stout, 7 Wall. 657; Bird v. Holbrook, 4 Bing. 628; Birge v. Gardener, 19 Conn. 507; Lynch v. Nudin, 1 Q. B. 29; Ferguson v. Columbus, etc., Co., 77 Ga. 102.

<sup>5</sup>Cohen v. New York, 113 N. Y. 532, S. C. 10 Am. St. Rep. 506. It was so held in the case cited although the city, without authority, had granted him a permit to make such use of the street. It is, of course essential, in the class of

Adjoining land owners are usually permitted to place material upon the street or sidewalk in front of their premises and to make a reasonable use thereof for the purpose of erecting, repairing, or improving buildings upon their land; but reasonable diligence should be used to complete the work,<sup>1</sup> and ordinary care must be taken to warn travelers of the obstruction and danger.<sup>2</sup> So, while an adjoining proprietor may make a temporary use of a street or sidewalk for the purpose of loading and unloading goods, he has no right to make a permanent or unreasonable use thereof, for "such an unreasonable interference with a highway is a nuisance, and the utmost care used in the creation or enjoyment of a nuisance is no excuse for it."<sup>3</sup>

cases above referred to, that the wrong should be the proximate cause of the damages the plaintiff sustains, but it is not necessary that it should be the direct cause. *Weirck v. Lander*, 75 Ill. 93; *Townsend v. Wathen*, 9 East, 277; *Billman v. The Indianapolis, etc., Co.*, 76 Ind. 166, S. C. 40 Am. R. 230. "A long series of judicial decisions," said the Supreme Court of California, "has defined proximate or immediate and direct damages to be the ordinary and natural results of the negligence, such as are usual, and therefore might have been expected." *Henry v. Southern, etc., Co.*, 50 Cal. 176. But it is not necessary, in any case, that the precise injury which actually occurred might have been foreseen or anticipated. If there is a culpable wrong and injury results there is a right of action, unless the injury which occurred was so unnatural or extraordinary as not to be considered the proximate result of the wrong. *Dane v. The Atlantic Works*, 111 Mass. 136; *Hill v. Winsor*, 118 Mass. 251; *Newell v. Whitcher*, 53 Vt. 589, S. C. 38 Am. R. 703; *Louisville, etc., Co. v. Wood*, 113 Ind. 544, 566. Nor is it necessary that the damages should directly or immediately result, nor that there should be no intervening

agency. *Henry v. Dennis*, 93 Ind. 452, *Pastene v. Adams*, 49 Cal. 87; *Lake v. Milliken*, 62 Me. 240; *Nichols v. Athens*, 66 Me. 402; *Merrill v. Claremont*, 58 N. H. 468; *Lowry v. Manhattan, etc., Co.*, 99 N. Y. 158; *DeCamp v. Sioux City*, 74 Ia. 392, S. C. 37 N. W. R. 971; *Smethhurst v. Proprietors, etc.*, 148 Mass. 261, S. C. 19 N. E. R. 387.

<sup>1</sup> *Stuart v. Havens*, 17 Neb. 211.

<sup>2</sup> *Vanderpool v. Husson*, 28 Barb. 196; *Jackson v. Schmidt*, 14 La. Ann. 818. The builder is not bound to make the highway as safe as if no obstruction were there. He must simply use reasonable care and prudence to protect those who may pass or use the highway at that point. *Nolan v. King*, 97 N. Y. 565.

<sup>3</sup> 2 Shearm. & Red. on Neg., section 362. See, also, *Rex v. Russell*, 6 East, 427; *Rex v. Cross*, 3 Campb. 224; *Queen v. Davis*, 24 N. C. C. P. 575; *People v. Cunningham*, 1 Denio, 524; *Callanan v. Gilman*, 107 N. Y. 360, S. C. 1 Am. St. Rep. 831, and note; *Denby v. Willer*, 59 Wis. 240; *Wood on Nuisances*, section 257. Travelers are, however, bound to take notice of such temporary obstructions as the demands of commerce or business make necessary and can not recover for injuries caused

An interesting case respecting the liability of a property owner who made use of the sidewalk while constructing a building upon an abutting lot recently arose in Michigan. The defendant was engaged in erecting a house upon his wife's lot and had entire control and direction of the work. One of the men employed by him took up the sidewalk in front of the lot for the purpose of hauling in brick from the street, without being ordered or directed so to do by the defendant, but the latter permitted such use to continue until the wagon had cut ruts in the ground, where the pavement had been taken up, into one of which the plaintiff fell and was injured, and the court held that the defendant was guilty of misfeasance for which he was liable to the plaintiff as well as to his principal.<sup>1</sup> So, the owner of a building with a projecting roof so constructed that snow collected on it from natural causes will, in the ordinary course of events, fall on the adjoining highway, is liable, without other proof of negligence, to a person who, while rightfully stopping on the street to unload his wagon, is thrown out and injured in consequence of snow falling on his horse from the roof and causing it to start suddenly.<sup>2</sup>

If a building is constructed by an owner so as to be so unsafe and insecure as to endanger the person or the property of another, and injury actually occurs he is liable, although the building was erected by an independent contractor.<sup>3</sup> Where the owner uses proper care and skill in constructing and securing the walls of a building he is exonerated from liability, although an extraordinary rain storm causes the walls to fall.<sup>4</sup> An owner engaged in erecting a building along the line of a street is bound to use ordinary care to prevent injury to passers by from falling objects.<sup>5</sup>

The abutting owner may be liable to the public corporation having control of the road or street, and under a legal duty to

thereby when they are themselves in fault. *Buesching v. St. Louis Gas Light Co.*, 6 Mo. App. 85. 148 Mass. 261. See, also, *Shipley v. Fifty Associates*, 106 Mass. 194.

<sup>1</sup>*Ellis v. McNaughton* (Mich.), 42 N. W. Rep. 1113. <sup>3</sup>*Wilkinson v. Detroit, etc., Co.* (Mich.), 41 N. W. R. 490.

<sup>4</sup>*Couts v. Neer*, 70 Tex. 468, S. C. 9 W. Rep. 1113.

<sup>2</sup>*Smethurst v. Barton Square Church*, S. W. R. 40.

<sup>5</sup>*Jager v. Adams*, 123 Mass. 26.

keep it in suitable condition for travel, for unlawfully meddling with the way to the injury of such corporation. If the owner wrongfully makes the way unsafe the corporation may repair it and recover of him the amount it was compelled to expend in making the repairs.<sup>1</sup> We can see no reason why this doctrine is not sound, for the corporation under a duty to repair is entitled to be reimbursed to the extent of the money it has been compelled to pay to repair the mischief caused by the wrongdoer. Certainly, the corporation, in such a case, is the party injured, and to it the injury is a special one, so that there is no valid reason why it should not be entitled to recover all the damages it has sustained. The corporation has, in a qualified sense, at least, a property right in its roads and streets, and this right is sufficient to entitle it to maintain an action against one who causes it loss by wrongfully disturbing such highways. The technical rule, which some of the old cases laid down, that the public corporation has no such property in the public ways as will enable it to maintain an action, if, indeed, it ever was defensible on principle, is without force under the present prevailing American system, which compels the local organization to bear the expense of keeping the way in a suitable condition for travel. The gravamen of the action under our system is, in truth, not to recover for injury done to the property, but to recover damages because of the pecuniary loss caused the corporation,<sup>2</sup> and it seems clear, therefore, that the corporation is the real party in interest.

The abutter may also be liable to an indictment the same as any one else who maintains a nuisance in a highway.<sup>3</sup> In

<sup>1</sup> *Town of Centerville v. Woods*, 57 Ind. 192; *Bishop Non-Contract Law*, section 1005.

<sup>2</sup> It may be doubted whether the old technical rule ever had a solid foundation, under the American system of local government, for the local authority in control of the public way has some property in it, since it holds the road or street as the public representative, and is against every one except the State in full control of the way.

<sup>3</sup> *Rex v. Jones*, 3 Campb. 230; *McDonald v. Newark*, 42 N. J. Eq. 136; *Langsdale v. Bonton*, 12 Ind. 467; *Boyer v. State*, 16 Ind. 451. The fact that the owner has opened a new road is no defence. *Weathered v. Bray*, 7 Ind. 706; *State v. Harden*, 11 S. C. 360. And injunction will lie in a proper case. *Callanan v. Gilman*, 107 N. Y. 360, S. C. 1 Am. St. Rep. 831.



Texas, a statute exists making the *willful* obstruction of a highway a public offense, and it is held that there can be no conviction under such statute, where the abutting owner, intending to build his fence on his own line, by mistake places it within the limits of the highway.<sup>1</sup> In Wisconsin, the statute prescribes a penalty for obstructing a highway, and it is held that a fence built by an adjoining owner within the limits of the highway is an encroachment, and not an obstruction for which a penalty can be recovered under the statute.<sup>2</sup>

<sup>1</sup> *Parsons v. State*, 26 Tex. Ct. App. Ind. 298; *Nichols v. State*, 89 Ind. 298. 192, S. C. 9 S. W. Rep. 490. Compare, <sup>2</sup> *State v. Pomeroy*, 73 Wis. 664; *State v. Baltimore, etc., R. R. Co.*, 120 Pauer *v. Albrecht*, 72 Wis. 416.

## CHAPTER XXVIII.

### HIGHWAYS AS BOUNDARIES AND INCUMBRANCES.

It is said by the Supreme Court of Connecticut,<sup>1</sup> that there is no instance where the fee of a highway, as distinct from the adjoining land, was ever retained by the vendor. It can not be presumed that a grantor would part with his interest in the adjoining land and yet retain the fee of the highway subject to the public easement. The general rule is, therefore, well settled that "a grant of land bounded upon a highway or river, carries the fee in the highway or river to the center of it, provided the grantor at the time owned to the center, and there be no words or specific description to show a contrary intent."<sup>2</sup> Thus, a deed conveying land described therein as bounded "by," "on," "upon," or "along" a highway *prima facie* carries the fee to the center of the highway.<sup>3</sup> But this presumption that the adjoining owner intended to convey his interest in the highway is not conclusive. It is a rebuttable presumption. He may convey either separately—the soil under the highway without the adjoining land, or the adjoining land without the soil under the highway—and if he uses express

<sup>1</sup> *Peck v. Smith*, 1 Conn. 103, S. C. 6 Am. Dec. 216, 220.

<sup>2</sup> 3 Kent's Comm. 434; *Salter v. Jonas*, 10 Vroom (N. J.), 469, S. C. 23 Am. Rep. 229; *Lozier v. N. Y. Cent. R. R. Co.*, 42 Barb. 465; *Dunham v. Williams*, 37 N. Y. 251; *Sanborn v. Rice*, 129 Mass. 387; *Peabody Heights Co. v. Sadtler*, 63 Md. 533; *Kohler v. Kleppinger* (Pa.), 5 Atl. Rep. 750, and note. Where the grantor owns the fee of the entire street, and the adjoining land is owned by a stranger, the deed will carry the fee to the opposite

side. *In re Robbins*, 24 N. W. Rep. 356, S. C. 34 Minn. 99.

<sup>3</sup> *Newhall v. Ireson*, 8 Cush. 595, S. C. 54 Am. Dec. 790; *Dean v. Lowell*, 135 Mass. 55; *Peck v. Denniston*, 121 Mass. 18; *Sherman v. McKeon*, 38 N. Y. 267; *Bissell v. N. Y. Cent. R. R. Co.*, 23 N. Y. 61; *Berridge v. Ward*, 10 C. B. (N. S.), 400; *Gove v. White*, 20 Wis. 432; *Banks v. Ogden*, 2 Wall. 57, 68; *Oxton v. Groves*, 68 Me. 371, S. C. 28 Am. Rep. 75; *Chatham v. Brainerd*, 11 Conn. 603; *Morrow v. Willard*, 30 Vt. 118; *Tiedeman on Real Property*, section 837.

terms excluding the highway, or if the facts and circumstances are such as to clearly show that he intended that no interest in the fee of the highway should pass, such presumption is overcome, and the grantee will take only to the side of the highway.<sup>1</sup> The question is one of intention, to be ascertained from the language of the deed together with other facts and circumstances properly going to explain that language, such as the situation of the lands and the relation of the parties, the presumption of intent to pass the title to the center of the road prevailing, unless a contrary intention appears.<sup>2</sup>

Some courts have carried the presumption that the grantor intended to convey his interest in the highway, so far as to hold that where the descriptive words are, "by the side of," "by the margin of," "along the south line of," or the like, the grantee will take to the center of the road or street.<sup>3</sup> It is generally held, however, in such cases, that the highway is excluded, as these words show such an intention.<sup>4</sup> Certainly the way should be excluded if, in addition to such words, metes and bounds are set forth, showing that such must have been

<sup>1</sup> *White's Bank v. Nichols*, 64 N. Y. 66; *Morrow v. Willard*, 30 Vt. 118, 120, *Moody v. Palmer*, 50 Cal. 31. This is generally true where the government or the municipality owns the fee. *Dunham v. Williams*, 37 N. Y. 251, *Kings County Ins. Co. v. Stevens*, 87 N. Y. 287; *White v. Godfrey*, 97 Mass. 472; *Phelps v. Webster*, 134 Mass. 17; *Falls v. Reis*, 74 Pa. St. 439. And this is true, as a rule, wherever the grantor owns only to the line of the street. *Brainard v. Boston, etc., R. R. Co.*, 12 Gray, 410; *Church v. Meeker*, 34 Conn. 426.

<sup>2</sup> *Webber v. Eastern R. R. Co.*, 2 Metc. 151; *Gaylord v. King*, 142 Mass. 495, S. C. 8 N. E. Rep. 596; *Bradford v. Cressey*, 45 Me. 9; *Mott v. Mott*, 68 N. Y. 246; *Kings County Ins. Co. v. Stevens*, 87 N. Y. 287, 291. Where the grantor does not own the fee of a high-

way or railroad the law will not presume that he intended to convey it, although he describes his land as running "to" and "upon" or "along" the highway or railroad. *Church v. Stiles (Vt.)*, 10 Atl. Rep. 674.

<sup>3</sup> *Salter v. Jonas*, 10 Vroom (N. J.), 469, S. C. 23 Am. Rep. 229; *Kneeland v. VanValkenburg*, 46 Wis. 434, S. C. 32 Am. Rep. 719; *Oxton v. Groves*, 68 Me. 371; *Paul v. Carver*, 26 Pa. St. 223.

<sup>4</sup> *Kings County Ins. Co. v. Stevens*, 87 N. Y. 287; *Hughes v. Providence, etc., R. R. Co.*, 2 R. I. 508; *Baltimore, etc., R. R. Co. v. Gould (Md.)*, 8 Atl. Rep. 754; *Noble v. Cunningham*, 1 McM. Eq. 289, *Sibley v. Holden*, 10 Pick. 249; *Grand Rapids, etc., R. R. Co. v. Heisel*, 38 Mich. 62, S. C. 31 Am. Rep. 306, 313; *Moody v. Palmer*, 50 Cal. 31. See, also, note to *Salter v. Jonas*, 23 Am. Rep. 233.

the intention.<sup>1</sup> It seems, however, that if no such words are used and no highway is mentioned, although the description by courses and distances should carry the line along the side of a highway, the land to the center of the way will also pass;<sup>2</sup> but this rule will not hold good where, as in the infancy of a town, the streets are merely undefined portions of land dedicated to public use, themselves requiring to be located.<sup>3</sup>

Where a road or street is referred to in a deed as a boundary, the highway as opened and actually used, rather than its record lay out, will generally be taken as the boundary intended by the parties to the deed.<sup>4</sup> So, where a land owner, holding under a deed which called for a public road, conveyed his interest and title to another by a deed containing a similar description, it was held that the grantee took the same rights in the road that his grantor had, although the road had been vacated, but not closed, before the execution of the second deed.<sup>5</sup> Where, however, the owner of a strip of land separating other land owned by him from a highway conveyed the latter tract, it was held that his subsequent dedication of the strip for highway purposes conferred on the grantee no title to the fee in the highway.<sup>6</sup> But where the owner of land platted it into lots and streets, and laid out a street on the margin, wholly on his own land, and next to unplatted lands belonging to a stranger, it was held that a conveyance by such owner of lots bounded on the street carried the fee to the entire street.<sup>7</sup>

<sup>1</sup> *Palmer v. Dougherty*, 33 Me. 507; *Cole v. Haynes*, 22 Vt. 588; *Hoboken Land Co. v. Kerrigan*, 30 N. J. L. 16.

<sup>2</sup> *Gear v. Barnum*, 37 Conn. 229; *Stark v. Coffin*, 105 Mass. 328; *Cox v. Freedley*, 33 Pa. St. 124, S. C. 75 Am. Dec. 584; *Paul v. Carver*, 26 Pa. St. 223.

<sup>3</sup> *Saltonstall v. Riley*, 28 Ala. 164, S. C. 65 Am. Dec. 334.

<sup>4</sup> *Aldrich v. Billings*, 14 R. I. 233; *Falls Village, etc., Co. v. Tibbetts*, 31 Conn. 167; *Bristol Mfg. Co. v. Barnes* (Conn.), 5 Atl. Rep. 593; *O'Brien v. King* (N. J.), 7 Atl. Rep. 34; *Smith v. State*, 23 N. J. L. 130; *Cleveland v.*

*Obenchain*, 107 Ind. 591. The doctrine that the grantee takes to the center is applied to actual and not to mere paper highways. *Plumer v. Johnston*, 63 Mich. 165; *Hopkinson v. McKnight*, 31 N. J. L. 422.

<sup>5</sup> *Ott v. Kreiter* (Pa.), 1 Atl. Rep. 724.

<sup>6</sup> *Valley Pulp Co. v. West*, 58 Wis. 599.

<sup>7</sup> *In re Robbins*, 34 Minn. 99, S. C. 57 Am. Rep. 40. See, also, *Taylor v. Armstrong*, 24 Ark. 102. Compare *Brisbine v. St. Paul, etc., R. R. Co.*, 23 Minn. 114, 130.

When reference is made in a deed to a "contemplated street," a plan which shows the location, width, and course of such "contemplated street" is admissible in evidence, although the plan is not referred to in the deed.<sup>1</sup> And where a deed describes land as bounded by certain streets as shown upon a plan therein referred to, and the dimensions of the land are stated to be as shown by the plan, thus excluding the streets, if taken literally, the conveyance will nevertheless be held, by implication, to include one-half of the adjacent street if the grantor owns the same and if there is nothing further to show a contrary intention.<sup>2</sup> A grant in such a deed, of the right to use the street in common with the grantor, does not exclude the inference of a grant of one-half thereof, for it is designed to show that the grantee shall have a right to use the entire street.<sup>3</sup>

Grantees of lots fronting on unplatted lands of the grantor are entitled to a way; and where such lots are situated on a line with the boundary of a street, which, if continued, would, as indicated by the plat, extend along the front thereof, an intention may be implied from the plat and the situation of adjacent blocks and streets, as indicated thereon, that such street should be extended and opened, and the grantees will take the fee to the center of such street so extended.<sup>4</sup> And where adjoining proprietors lay out their lands into city lots, acknowledging and recording plats thereof with nothing upon them to indicate the original boundaries, thus in fact extinguishing such boundaries, intending that the lots shall be bought and sold by such plats, or where the plats indicate the center of the street as the line of original division, the presumption that the fee extends to the center of the street becomes conclusive in favor of good faith purchasers and grantees of either proprietor, without notice of the rights of the other.<sup>5</sup> But where lots were laid

<sup>1</sup> *Barrett v. Murphy* (Mass.), 2 N. E. Rep. 833.

<sup>2</sup> *Gould v. Eastern R. R. Co.*, 142 Mass. 85, S. C. 7. N. E. Rep. 543. See, also, *Clark v. Parker*, 106 Mass. 554; *Berridge v. Ward*, 10 C. B. (N. S.) 400.

<sup>3</sup> *Gould v. Eastern R. R. Co.*, 142 Mass. 85; *Motley v. Sargent*, 119 Mass.

231; *Peck v. Denniston*, 121 Mass. 17. Compare *Old South Society v. Wainwright*, 141 Mass. 443.

<sup>4</sup> *Hurley v. Miss., etc., Co.*, 34 Minn. 143.

<sup>5</sup> *Weisbrod v. Chicago, etc., R'y Co.*, 18 Wis. 35, S. C. 86 Am. Dec. 743. See, also, *Pettibone v. Hamilton*, 40 Wis. 411.

out and platted and streets were dedicated upon condition that they should revert to the original owner when discontinued by law, it was held that the effect of a vacation of one of the streets by the common council and the replatting of the land so as to furnish a new street front to the lots that had abutted on the vacated street, was to obliterate the lines of the first plat and to substitute new lot lines, which were valid as boundaries of the lots, according to the new subdivision, and that the street on the original plat could not be claimed as a way of necessity.<sup>1</sup>

Are highways incumbrances? This has long been a vexed question. As a general rule, any right of a third person in land, diminishing its value, is an incumbrance, although it may not prevent the passing of the fee by deed of conveyance. It makes no difference whether that third person is an individual, a company or a corporation, either public or private, and the effect is the same whether the way be public or private. "It is a legal obstruction to the purchaser to exercise that domain over land to which the lawful owner is entitled. An incumbrance of this nature may be a great damage to the purchaser, or the damage may be very inconsiderable, or merely nominal. The amount of damages is a proper subject of consideration for the jury who may assess them, but it can not affect the question whether a public town road is, in legal contemplation, an incumbrance of the land over which it is laid."<sup>2</sup> It has accordingly been held in Alabama, Connecticut, Illinois, Massachusetts, Maine, Missouri, New Hampshire and Vermont, that a public highway over land is an incumbrance constituting a breach of warranty against incumbrances.<sup>3</sup> It was formerly held in Indiana that a public road is not an incumbrance,<sup>4</sup> but the later authorities hold that it is.<sup>5</sup> In New York, Pennsylvania, Virginia and Wisconsin, the rule seems to be that a highway is not an incumbrance, or, at least, that the purchaser takes

<sup>1</sup> *Plumer v. Johnston*, 63 Mich. 165.

<sup>2</sup> *Per* Parsons, C. J., in *Kellogg v. Ingersoll*, 2 Mass. 97, 101.

<sup>3</sup> *Dunn v. White*, 1 Ala. 645; *Hubbard v. Norton*, 10 Conn. 422; *Beach v. Miller*, 51 Ill. 206, S. C. 2 Am. Rep. 290; *Parish v. Whitney*, 3 Gray, 516; *Haynes v. Young*, 36 Me. 557, *Lamb*

*v. Danforth*, 59 Me. 322; *Kellogg v. Malin*, 50 Mo. 496; *Pritchard v. Atkinson*, 3 N. H. 335; *Butler v. Gale*, 27 Vt. 739; *Rawle on Cov.*, 115, 120.

<sup>4</sup> *Scribner v. Holmes*, 16 Ind. 142.

<sup>5</sup> *Burk v. Hill*, 48 Ind. 52, S. C. 17 Am. R. 731.

subject thereto.<sup>1</sup> Some of the courts have drawn a distinction as against a purchaser who has knowledge of the existence of the highway at the time of the purchase, holding that, in such a case, there is no breach of the covenant against incumbrances;<sup>2</sup> but other courts have refused to recognize any such distinction.<sup>3</sup> The Virginia Court of Appeals, in their latest decision,<sup>4</sup> state that their reason for holding in an earlier case<sup>5</sup> that the existence of the highway therein alleged to be an incumbrance did not constitute a breach of the covenants of the deed was because it appeared that the way was known to the purchaser and must have been taken into consideration when the purchase was made. They now hold that the covenant of seizin, as well as the covenant for quite possession and enjoyment free from incumbrances, is broken where, without the knowledge of the grantee, the lot conveyed and part of the buildings encroach on a public street so that the grantee is obliged to tear down a portion of the buildings and repave the street.<sup>6</sup> But, where the fee remains in the grantee, the mere existence of a highway upon the land, although an incumbrance is not, ordinarily at least, a breach of the covenant of seizin.<sup>7</sup>

The tendency of nearly all of the courts which originally seemed to countenance the doctrine that a highway is not such an incumbrance as will constitute a breach of warranty has, of late, been toward a modification of that doctrine in accordance with the distinction drawn by the Virginia court. The rule, as

<sup>1</sup> *Whitbeck v. Cook*, 15 Johns. 483, S. C. 8 Am. Dec. 272; *Cincinnati v. Brachman*, 35 Ohio St. 289; *Peterson v. Arthurs*, 9 Watts (Pa.), 152; *Wilson v. Cochran*, 46 Pa. St. 232; *Kutz v. McCune*, 22 Wis. 628; *Jordan v. Eve*, 31 Gratt. 1.

<sup>2</sup> *Desvergers v. Willis*, 56 Ga. 515, S. C. 21 Am. Rep. 289; *Jordan v. Eve*, 31 Gratt. 1; *Hymes v. Esty* (N. Y.), 22 N. E. R. 1087. In *Huyck v. Andrews*, 113 N. Y. 81, S. C. 10 Am. St. Rep. 432, the court refused to apply this doctrine to ordinary easements, and stated that highways are the sole exception to

the rule that knowledge by the grantee of the existence of an easement is no defense to an action for breach of covenant.

<sup>3</sup> *Van Wagner v. Van Nostrand*, 19 Ia. 422; *Medler v. Hiatt*, 8 Ind. 171; *Beach v. Miller*, 51 Ill. 206, S. C. 2 Am. R. 290; *Butler v. Gale*, 27 Vt. 739.

<sup>4</sup> *Trice v. Kayton*, 84 Va. 217, S. C. 10 Am. St. Rep. 836.

<sup>5</sup> *Jordan v. Eve*, 31 Gratt. 1.

<sup>6</sup> *Trice v. Kayton*, *supra*.

<sup>7</sup> *Kellogg v. Malin*, 50 Mo. 496, S. C. 11 Am. Rep. 426.

modified, and the reasons supporting it are thus stated by the New York Court of Appeals: "The exemption of the easement to the public in a highway from the operation of the covenant of warranty evidently rests upon the presumption arising from the opportunity furnished to the purchaser, by its apparent existence or use, to take notice of it; and, when that is the situation, the purchaser is charged with knowledge of it. But when no such opportunity exists, and no means of notice of the existence of the right to a public easement is open to observation upon the premises, there is no well founded reason to support the proposition that the subsequent appropriation by the public, in the exercise of such pre-existing right, of a portion of the land conveyed, is exempt from the operation of the covenant of warranty."<sup>1</sup>

A valid assessment upon property for the opening of a street upon which it abuts, existing at the time the property is conveyed, is also an incumbrance constituting a breach of the covenant against incumbrances.<sup>2</sup> So, where such an assessment has been made and vacated, and a re-assessment has been imposed in lieu thereof, it is held that the latter attaches as of the date of the original assessment, and a purchaser, under a deed dated after the original assessment, but prior to the new assessment, may maintain an action for a breach of the covenant against incumbrances.<sup>3</sup> But the opening of a highway over the land conveyed, subsequent to the date of the conveyance, un-

<sup>1</sup> *Hynes v. Esty*, 22 N. E. Rep. 1087. See, also, *Appeal of People's Bank (Pa.)*, 3 Atl. Rep. 821. This doctrine has the merit of plausibility. It does not deny that a highway is in the nature of an incumbrance, but seeks to avoid the effect thereof by presuming that the purchaser takes his title with reference thereto. But it seems to us that when it is once admitted, as we think it ought to be, that a highway is an incumbrance, the fact that the grantee has notice thereof ought not to prevent the operation of the covenant of warranty.

The grantor certainly ought to have as much knowledge of his own property as the grantee, and if he chooses to make a warranty deed he ought to make his warranty good.

<sup>2</sup> *Bemis v. Caldwell*, 143 Mass. 299, S. C. 9 N. E. R. 623, 624; *Cadmus v. Fagan* (N. J.), 4 Atl. R. 323. See, also, *Kirkpatrick v. Pearce*, 107 Ind. 520.

<sup>3</sup> *Cadmus v. Fagan* (N. J.), 4 Atl. R. 323. See, also, *White v. Stretch*, 22 N. J. Eq. 76; *Commissioners v. Linden*, 40 N. J. Eq. 27.



der the power of eminent domain, is not a breach of the covenant of warranty against incumbrances.<sup>1</sup>

<sup>1</sup> Alabama, etc., *R. R. Co. v Kennedy*, St. 75; *Peck v. Jones*, 70 Pa. St. 83; 39 Ala. 307. See, also, *Gee v. Moore*, *Ellis v. Welch*, 6 Mass. 246, S. C. 4 14 Cal. 472; *Dobbins v. Brown*, 12 Pa. Am. Dec. 122.

## CHAPTER XXIX.

### STREET RAILWAYS.

A street railway is a railway laid down upon roads or streets for the purpose of carrying passengers. The term "street railway" is neither as definite nor as expressive as is desirable, but it seems to be the best and most appropriate at command. It will not do to designate a street railroad as a "horse railroad," as is often done, for the power by which the cars are drawn along the tracks is frequently mechanical, nor will it do to designate a street railway as a "tramway," for a tramway is said to be "a railroad laid along the roads or streets of a town or city on which cars for carriage of goods or passengers are drawn by horses or by some mechanical means," and this definition shows that tramways possess an essential feature that street railways do not. The term "street" is too restrictive, for street railways may be operated upon suburban roads. But, with all its short comings and imperfections, the term "street railways" seems best to express the meaning we desire to convey.

The distinctive and essential feature of a street railway, considered in relation to other railroads, is that it is a railway for the transportation of passengers and not of freight. As we employ the term and desire it to be understood, it excludes the idea of the carriage of freight, for we do not believe that a railroad over which heavily laden freight trains are drawn can be considered a street railway. It was not intended when the road or street was dedicated or appropriated that a private corporation should divert the way from its usual and appropriate use to an essentially different use for the purpose of corporate

gain.<sup>1</sup> This view prevails with the courts generally, for the decided weight of authority is, that an ordinary railroad constitutes an additional burden which entitles the owner of the fee to compensation,<sup>2</sup> but that the laying down of a street railway track does not impose any additional burden upon the land.<sup>3</sup> But, while an ordinary street railway constructed in the usual mode, and so constructed as not to materially impair the easement of access, can not, as the adjudged cases declare, be considered an additional burden, yet, where it is so constructed as to materially impair the rights of the abutter, it seems to us that it should be treated as an additional burden entitling the owner to compensation, but this is true only where the alteration is made in the street solely for the use and accommodation of the railway company.<sup>4</sup> If, for instance, embankments are raised

<sup>1</sup> A street railway is not, in a strict sense, a railroad. *Louisville, etc., Co. v. Louisville, etc., Co.*, 2 Duvall (Ky.), 175.

<sup>2</sup> Rights and Remedies of Abutters, Chapter XXVI.

<sup>3</sup> *Eichels v. Evansville, etc., Co.*, 78 Ind. 261; *Elliott v. Fair Haven, etc., Co.*, 32 Conn. 579; *Hiss v. Baltimore, etc., Co.*, 52 Md. 242, S. C. 36 Am. R. 371; *Peddicord v. Baltimore, etc., Co.*, 34 Md. 466; *Attorney General v. Metropolitan, etc., Co.*, 125 Mass. 515, S. C. 28 Am. R. 264; *Hobart v. Milwaukee, etc., Co.*, 27 Wis. 194, S. C. 9 Am. R. 461; *Cincinnati, etc., Co. v. Cummins-ville*, 14 Ohio St. 523; *Hinchman v. Paterson*, 17 N. J. Eq. 75; *Jersey City, etc., Co. v. Jersey City, etc., Co.*, 20 N. J. Eq. 61; *Savannah, etc., Co. v. Mayor*, 45 Ga. 602; *Brown v. Duplessis*, 14 La. Ann. 842; *Carson v. Central, etc., Co.*, 35 Cal. 325; *Texas, etc., Co. v. Rose-dale*, 64 Tex. 80; *Van Bokelen v. Brooklyn, etc., Co.*, 5 Blatch. 379.

<sup>4</sup> *Craig v. Rochester*, 39 N. Y. 404; *Story v. N. Y., etc., Co.*, 90 N. Y. 122. For a collection of the New York cases see 3 Abbott's New Cases, 306, *et seq.* Upon the general subject, the following

cases are interesting and instructive. *Barnett v. Johnson*, 15 N. J. Eq. 481; *Bell v. Gough*. 3 Zab. (N. J.) 624; *Thurston v. City of St. Joseph*, 51 Mo. 514; *Codman v. Evans*, 5 Allen, 308. In the recent case of *Ottentot v. N. Y., etc., Co.*, 41 Alb. L. J. 194, the New York Court of Appeals seems to somewhat limit some of its former decisions. In that case it was held that the city might empower a street railway company to construct an embankment in the street, and that an abutter could not recover damages no matter how much his property was injured. The reasoning of the court is, that the city had discretionary authority to change the grade, "and it must be immaterial what the causes were which made the change of grade necessary or useful." The rule that municipal corporations may change the grades of streets at pleasure is, at best, not easily defended, and to so extend it as to make it work for the benefit of a private corporation at the expense of a property owner, is giving a harsh rule an application that it should never receive. The rule which lies at the foundation of the reasoning in the opinion of the court in the case

in the street solely for the purpose of accommodating the railway company and not as part of the system for the improvement of the streets, and the access to the abutting property is thus shut off, the owner is entitled to reimbursement for the loss he actually sustains. This doctrine is, as we believe, within the principle asserted in the elevated railway cases and in other kindred cases, and it has a foundation in solid principle. It is a sacrifice of substantial right to an imaginary logical deduction to hold that, because the use is for a street railway, therefore no recoverable loss is sustained by the abutter whose property is lessened in value. It is, in truth, somewhat difficult to vindicate the doctrine that private corporations may use the streets of a city for their own benefit, but as the question is firmly settled by authority it is profitless to discuss it now; it is not, however, inappropriate to suggest that the doctrine ought not to be extended.<sup>1</sup> At the hazard of incurring censure, we venture to suggest that courts in giving way, at the outset, to enterprises that seemed to promise great public good, have been somewhat unmindful of the rights of the individual property owner, and have sacrificed his rights to a presumed public benefit without heeding his individual loss.<sup>2</sup> If, as may, per-

cited has found little favor with text-writers, and has been almost everywhere condemned and overthrown by legislation. We do not believe that the discretionary power to change the grades of streets exists where the change is solely for the benefit of a private corporation or an individual. We can not avoid the conviction that the courts may inquire whether the change is for municipal purposes or exclusively for the benefit of a private corporation, and if they find that it is solely for the benefit of such a corporation they may rightfully interfere.

<sup>1</sup> It is to be regretted that Mitchell, J., did not develop the views so well outlined by him in the case of *Newell v. Minneapolis, etc., Co.*, 35 Minn. 112, for the suggestions made by him will bear elaboration. "It seems to me,"

said he, "that the maintenance and operation of defendant's railroad constitutes a servitude additional to, and different from, the use for which the streets were acquired—in short, a new use of the streets, not contemplated at the time of their dedication. I do not see that this road differs from any ordinary commercial railroad except that it uses the entire length of the street as its depot at which it receives and lets off passengers. As operated, it is, to a certain extent, in aid of travel on the street, but this is a secondary and incidental, and not its main and principal purpose."

<sup>2</sup> It is true, as history proves, that municipalities are quick to grant important privileges without restriction which they subsequently feel the necessity of limiting, but not until after it is

haps, be true in the great majority of instances, no injury is done the abutter by the construction and operation of a street railway, then he is not entitled to compensation, but it does not follow that, because there is no injury in the majority of cases, there is no injury in any. It seems to us that whether there is or is not actionable injury in a particular case must depend upon the facts of that case, and that it is not just to turn the sufferer away by affirming that the occupancy of the street by a street railway, in legal contemplation, does the owner of the fee no harm, and therefore he can have no compensation. It is neither logical nor just to conclude that, whatever may be the fact as to actual loss, no compensation can be enforced by law, because a street railway in the eye of the law can not injure the abutting property. Such a doctrine is, at all events, not likely to inspire a man who knows that he has suffered an actual loss, and that he can prove his loss, with a very high respect for the law.

Street railways are, in a general sense, highways, but they are not, in the strict sense, public ways, since their owners possess a private proprietary right in the franchise, and such railways are operated for private gain and not primarily for the public benefit. It is true that the public is incidentally benefited, but this benefit is not the chief purpose of the organization. A street railway can not be regarded as within a statute prescribing rules and regulations for highways unless it appears from the context, or from the object of the statute, that it was the legislative intention to include that class of highways.'

It is competent for a municipal corporation, invested with control of the streets, to prescribe what motive power shall be used in drawing the cars over the track, and when the ordinance is too late, and it is undeniably true that courts have not been entirely free from the same general influence which moved the local bodies.

<sup>1</sup> *Whitaker v. Eighth Avenue R. R. Co.*, 51 N. Y. 295. In this case it was said: "It is true, also, that every railway for the transportation of persons is for public use. It is, nevertheless, the private property of its owner; and

although the highway over which it passes remains a public highway, consistent with the unimpaired use of the railway, the railway itself is, notwithstanding, in the uses for which it was constructed a private road for the accommodation of the public and the profit of its owners, upon which no one but its owners have a right to run a car."

nance does provide what the motive power shall be, the company can not use any other. Thus where the provision is that the cars shall be drawn by horses or mules the company can not use steam power, nor can it construct a cable road.<sup>1</sup> Grants are construed against a corporation or company claiming a special franchise or privilege, and under this familiar rule, a street railway company can not successfully assert a right to use any other motive power than that provided in the ordinance licensing it to use the streets of the municipality.<sup>2</sup> It is, indeed, questionable, whether the silence of the ordinance upon this point will not be construed to mean that such motive power only may be used as is in common use at the time of the enactment of the ordinance. There is reason for presuming that the parties contemplated only such a use of the streets as was at the time ordinarily made by street railway companies. If the ordinance does authorize the use of steam as a motive power, then, as we suppose, the license can not be recalled unless there is a case of extraordinary strength wherein it appears that steam can not be used without almost certain danger to life and property.<sup>3</sup> It is possible to conceive a case where changes made by the growth of a city might be so great as to make it impossible to employ steam as a motive power without endangering the lives of those having a right to use the streets,<sup>4</sup> and it seems to us that,

<sup>1</sup> *People v. Newton*, 48 Hun. 477.

<sup>2</sup> *People v. Newton*, 112 N. Y. 396, S. C. 19 N. E. R. 664; *Denver, etc., Ry. Co. v. Denver, etc., Ry. Co.*, 2 Col. 681; *Citizens St. Ry. Co. v. Jones*, 34 Fed. R. 579. See, also, *Birmingham, etc., R. R. Co. v. Birmingham, etc., Co.*, 79 Ala. 465; *Mayor v. Ohio, etc., R. R. Co.*, 26 Pa. St. 355. Where a petition is required as a condition precedent to construct a track, it must conform to the statute. *In re Peoples R. R. Co.*, 112 N. Y. 578; *In re Union, etc., Co.*, 112 N. Y. 61.

<sup>3</sup> In the case of the *North Chicago City Ry. Co. v. Lake View*, 105 Ill. 207, it was said: "It is conceded that the company's charter authorizes it to maintain and operate a street railway

along and over the street in question, and it is contended that inasmuch as the charter is silent as to the power to be used in propelling the company's cars, the company has the option to use for that purpose either steam or horse power, as it may prefer. We think, in such a case, it would be more reasonable to hold the legislature intended the company should use the motive power in propelling its cars which would be most conducive to the best interests and safety of the public having occasion to use the street as a common highway, and which was then in ordinary use in the State."

<sup>4</sup> *North Chicago Ry. Co. v. Lake View*, 105 Ill. 183; *North Chicago Ry. Co. v. Lake View*, 105 Ill. 207. See,

in such a case, the municipal authorities might require the company to use some less dangerous motive power. It can hardly be possible that the municipality would be bound to yield its power to provide for the safety of its citizens, or that the citizens would be bound to surrender the use of the streets to further the interests of a private corporation. It would undoubtedly require an extraordinarily strong case to warrant the municipality in modifying its license and requiring the licensee to substitute some other motive power for that designated in the grant, but we are inclined to think there may be such a case.

The legislature may confer upon a street railway company the right to appropriate private property under the power of eminent domain, but a street railway company can not exercise such a right unless it is conferred by the legislature. It is quite clear that a grant by a municipal corporation to use its streets would not confer a right to seize private property.<sup>1</sup>

Roads or streets can not be occupied by street railway tracks without legislative sanction.<sup>2</sup> In an English case,<sup>3</sup> the governing officers of a parish granted the right to construct a tramway in the highway, and it was held that the grant was void,

also, *Kettering v. Jacksonville*, 50 Ill. 39; *Fash v. Third Avenue Ry. Co.*, 1 Daly, 150; *Regina v. Train*, 2 B. & S. 640; *Henderson v. Central Passenger Ry. Co.*, 20 Am. & Eng. Ry. Cases, 542.

<sup>1</sup> *South Beach Ry. Co. v. Byrnes* (N. Y.), 23 N. E. R. 486.

<sup>2</sup> *Eichels v. Evansville, etc., Co.*, 78 Ind. 261. "In this country no franchise can be held which is not derived from the law of the State." *People's R. R. v. Memphis*, 10 Wall. 38, 51. See *Davis v. Mayor, etc.*, 14 N. Y. 506; *Coleman v. Second Ave. R. R.*, 38 N. Y. 201.

<sup>3</sup> *Regina v. Train*, 2 B. & S. 640, S. C. 110 Eng. C. L. R. 640. In this case the court said: "But what has been done here is not making any arrangement for the use of the highway in the ordinary manner of using a highway. On the contrary, it is withdrawing so much of the highway from its ordinary use as such; for it is idle to say that

you can use as an ordinary part of this highway the portion taken up by the tramways. A carriage meeting an omnibus running on one of them can not give and take the road. The case is like that of *Reg v. The United Kingdom Electric Telegraph Company (Limited)*, which we have just disposed of and others of a similar nature. It also falls within *Reg v. The Longton Gas Company*, 29 L. J. M. C. 118, S. C. 6 Jurist N. S. 601, with which we took a good deal of pains, where a gas company without being authorized by statute opened trenches in the streets of a town for the purpose of laying down gas pipes, and this was adjudged a nuisance. If persons wish for power to act as the defendants acted here, they must take the usual regular and constitutional course of getting the protection of the legislature."

and that the tramway was a nuisance, the court declaring that such a grant could not be made without legislative authority. But it is not necessary that authority to construct street railways should be conferred by a direct grant from the legislature, for the power to authorize the construction of a street railway may be delegated to municipal corporations, and this is generally done.<sup>1</sup> Municipal corporations have no general or inherent power to create corporations, and it is only to such corporations as are created by law that they can grant the franchise of maintaining and operating street railways. Municipal corporations can not authorize the occupancy of the public streets for railway purposes unless the act of incorporation confers such power, but it is not necessary that the power to authorize the use of the street by railway companies should be granted in express terms, for where a municipal corporation is granted full and general control over the streets it may license their use for railroad purposes. Where such control is vested in a municipality, no street can be used for a railroad without the consent of the municipality, except, of course, where the legislature itself directly authorizes such a use. The general rule is that no one can use the public streets for any other purpose than that of ordinary travel, without the consent of the municipal authorities.<sup>2</sup>

<sup>1</sup> But the power of the municipal corporation to license the use of its streets is derived from the legislature, for independently of legislation it does not possess this power. In granting the franchise the municipality exercises a derivative power and not an inherent one. *State, ex rel., v. Hilbert* (Wis.), 39 N. W. R. 326; *Saginaw, etc., Co. v. City of Saginaw* (U. S. Cir. Ct.), 28 Fed. R. 529. Whether the municipality possesses the power to license the use of its streets for railway purposes must, of course, depend upon the charter or act of incorporation. The dominant power which the State possesses over all its highways vests in the legislature the authority to license the use of the streets of a city without the consent of

the municipal authorities. *Jersey City v. Railroad Co.*, 20 N. J. Eq. 360. But, whether the right to use the streets is granted by a city or by the legislature directly, the source of power is always the State, for a franchise in the highways can only be created by legislative grant. "This," says Judge Redfield, "is one of the prerogatives of sovereignty and derivable only through the legislature." *Redfield on Railways* (3d ed.), 317. See, also, <sup>2</sup> *Dillon's Municipal Corporation* (3d ed.), section 792.

<sup>2</sup> *Atchison St. Railway Co. v. Missouri, etc., Co.*, 31 Kan. 667; *Atchison St. Railway Co. v. Nave*, 38 Kan. 744, S. C. 7 Am. R. 800, *Indianola v. G. W. T. & P. R'y*, 56 Tex. 599; *People v. Comm'rs of Public Works*, 98 N. Y.



The prevailing opinion is that an ordinance proposing conditions and terms to a street railway company becomes an irrevocable contract when it is accepted by the company.<sup>1</sup> It is true, that in granting a railway company the right to use its streets, a municipal corporation exercises a governmental power delegated to it by the legislature, and the ordinance, when accepted, is in the nature of a contract, but it is not a contract entirely beyond municipal or legislative control. No contract can be made which assumes to surrender or alienate a strictly governmental power which is required to continue in existence for the welfare of the public.<sup>2</sup> This is especially true of the police power, for it is incapable of alienation.<sup>3</sup> It can not be doubted that a company which secures a right to use the streets of a municipal corporation takes it subject to the police power resident in the State as an inalienable attribute of sovereignty. It is upon this principle that it has been correctly held that a municipal corporation may displace the track of a street railway and prevent its operation for a reasonable time when it becomes necessary in order to enable the municipality to construct a sewer.<sup>4</sup> The surrender or alienation of the police power

6; Brooklyn, etc., Co. v. City of Brooklyn, 78 N. Y. 524.

<sup>1</sup> People v. Chicago, etc., Co., 18 Ill. App. Ct. 125; People v. O'Brien, 111 N. Y. 1, S. C. 7 Am. St. R. 684; State v. Noyes, 47 Me. 189; Com. v. Proprietors, etc., 2 Gray, 339. In People v. O'Brien, *supra*, it is held that a grant to a street railway company vests property in it in perpetuity although the corporation is created only for a limited period. The court cited, among others, the cases of People v. Sturtevant, 9 N. Y. 263, S. C. 59 Am. Dec. 536; Davis v. Mayor, 14 N. Y. 406, S. C. 67 Am. Dec. 186; Milhau v. Sharp, 27 N. Y. 611, S. C. 84 Am. Dec. 314. See City of Detroit v. Detroit, etc., Co., 43 Mich. 140, Com. v. Essex Co., 13 Gray, 239.

<sup>2</sup> It has been held by the Supreme Court of the United States that a State

may bind itself by a charter in the nature of a contract not to exercise the power of taxation. New Jersey v. Wilson, 7 Cranch. 164; McGee v. Mathes, 4 Wall. 143; Farrington v. Tennessee, 95 U. S. 679; University v. Illinois, 99 U. S. 309.

<sup>3</sup> Thorpe v. Rutland, etc., Co., 27 Vt. 140; Indianapolis, etc., Co. v. Kercheval, 16 Ind. 84; Bradley v. McAtee, 7 Bush. 677, S. C. 3 Am. R. 309; Brick Presbyterian Church v. Mayor, 5 Cowen, 538; Brimmer v. Boston, 102 Mass. 19; Horn v. Atlantic, etc., Co., 35 N. H. 169; Bulkley v. N. Y., etc., Co., 27 Conn. 479; Jones v. Galena, etc., Co., 16 Ia. 6; Penna. Co. v. Riblet, 66 Pa. St. 164, S. C. 5 Am. R. 360.

<sup>4</sup> Kirby, etc., Co. v. Citizens', etc., Co., 48 Md. 168. But, see Eddy v. Ottawa, etc., Co. (Canada), 31 Q. B. 569.

would, it is evident, lead to disastrous consequences, and there can be no doubt that the attempt to surrender or alienate this power, or to so fetter it as to impair its usefulness, would be void, but while this is true, it is also true that it is not possible to define and limit the power. To what extent it prevails as against chartered rights which are protected as rights flowing from a contract, it is not possible to say with certainty and precision, but we believe that it may be safely affirmed that the power extends so far as to require the private corporation to yield to the public welfare in the matter of the reasonable regulation of roads and streets.<sup>1</sup>

A municipal corporation invested with general control over the streets has authority to prescribe the terms and conditions upon which a railway company may construct and operate a railway in its streets. It may impose conditions and terms as to the repair of the street used by the company; it may exact a license fee for the use of the street;<sup>2</sup> and, in short, it may impose any conditions not illegal and not forbidden by the statute. What the legislature grants to a street railway company can not, however, be taken away or abridged by the municipality.<sup>3</sup>

A municipal corporation can not grant a right to construct a railroad in a street for private use.<sup>4</sup> We suppose it to be indispensable to the validity of a direct legislative grant that in every instance the use should be public, for highways are held in trust for the public for public purposes and no other. This rule is clearly the legitimate sequence of the fundamental principles that private property can never be seized under the power of eminent domain, and that roads and streets are held for the public use and never for permanent private purposes.<sup>5</sup>

<sup>1</sup> *Fitchburg, etc., Co. v. Grand Junction, etc., Co.*, 1 Allen, 552; *Pittsburgh, etc., Co. v. S. W., etc., Co.*, 77 Pa. St. 173; *Rodemacher v. Milwaukee, etc., Co.*, 41 Ia. 297, S. C. 20 Am. R. 592; *People v. Boston, etc., Co.*, 70 N. Y. 569; *Portland, etc., Co. v. Boston, etc., Co.*, 65 Me. 122; *Albany, etc., Co. v. The Watervliet, etc., Co.*, 45 Hun. 442; *City of St. Louis v. Missouri R. R. Co.*, 13 Mo. App. 524.

<sup>2</sup> *New Orleans v. New Orleans, etc., Co.*, 40 La. Ann. 587, S. C. 4 So. R. 572; *City of Newport v. South Covington, etc., R'y Co.* (Ky.), 11 S. W. R. 954.

<sup>3</sup> *In re Kings County Elevated R. R. Co.*, 105 N. Y. 97. See *Frayser v. The State*, 16 Lea. (Tenn.) 671.

<sup>4</sup> *Mikesel v. Durkee*, 34 Kan. 509.

<sup>5</sup> *Smith v. City of Leavenworth*, 15 Kan. 81.

There is some conflict in the decided cases upon the question of the power of the legislature to grant an exclusive right to a street railway company to occupy and use a highway. The weight of authority is that the legislature can not create a monopoly by granting an exclusive privilege, and this we regard as the sound doctrine.<sup>1</sup> But it is to be understood that it is not every grant that creates a monopoly although it may, to some extent, be exclusive, for the grant may be of a privilege or franchise that is, of necessity, in some measure of the nature of a monopoly. This is so in many cases, as, for instance, where the grant is to use a patented thing or a copyrighted article. In a less degree this is also true where there is a grant to use a designated part of a street or road for railway purposes. In such cases it is necessity that impresses the grant with its exclusive character, and it must either be conceded that the legislature may grant a privilege or franchise that is in some of its features monopolistic, or else the power of the legislature to make any grant at all in such cases must be denied. To deny the power of the legislature to make a grant that is of necessity of a monopolistic character, would lead to the unwarranted conclusion that in no case can the legislature grant the right to lay and operate a street railway in a road or street, for, if the power to make such a grant be conceded, it necessarily and unavoidably results that the occupancy of the part of the road or street is exclusive, as two railways can not occupy the same space. But it does not follow from this that a monopoly is created, for other parts of the road or street may be granted to

<sup>1</sup>Jackson Horse Car Co. v. Interstate Rapid Transit Co., 24 Fed. R. 306; Citizens' St. R'y v. Jones, 34 Fed. R. 579; New Orleans St. R'y Co. v. Crescent City R'y Co., 12 Fed. R. 308; Canal, etc., Co. v. Crescent City R'y Co. (La.), 6 So. R. 849; Kinsman St. R'y Co. v. Broadway, etc., Co., 36 Ohio St. 239; Memphis City R'y Co. v. Memphis, 4 Cold. 406; Birmingham, etc., Co. v. Birmingham St. R'y Co., 79 Ala. 465; St. Louis, etc., R'y Co. v. Belleville, 20 Ill. App. 581. See, also, Teachout v.

Des Moines, etc., R'y Co. (Ia.), 38 N. W. R. 145; Omaha Horse R'y Co. v. Cable Tramway Co., 30 Fed. R. 324; Denver, etc., Co. v. Denver, etc., Co., 2 Col. 681; New York, etc., Co. v. Mayor, 1 Hilt. (N. Y. C. P.) 562; Fort Worth, etc., R. R. Co. v. Rosedale, etc., Co., 68 Tex. 169; Gulf City, etc., Co. v. Galveston, 69 Tex. 660; Fort Worth, etc., Co. v. Queen City Co., 71 Tex. 165; Des Moines, etc., Co. v. Des Moines, 73 Ia. 513.

competing lines. If, however, the legislature should undertake to grant a right to transport all passengers over a designated highway, a monopoly would be created within the meaning of the constitution. The effect of a grant to use a designated part of a highway is to license the company first in point of time to occupy and use the designated space, but it does not follow from this that the statute creates a monopoly, since others may occupy other parts of the same highway. There is not, at all events, a monopoly of a business, nor is there a monopoly in the profits of a business; such a monopoly the legislature can not create.

There are many cases in which the right to confer privileges, which, in their essential features, are monopolistic, has been asserted. Thus, it has been held that the exclusive right to maintain a market may be granted.<sup>1</sup> The same principle is asserted in the cases which hold that excluding all persons except druggists from selling intoxicating liquors is a rightful exercise of legislative power.<sup>2</sup> A grant of a franchise to maintain a ferry is in its very nature exclusive, and yet such grants have from the earliest years of the common law been recognized as valid, indeed, no court has ever suggested a doubt as to their validity. It is evident that there are many grants which can not be anything else than exclusive, and the element of exclusiveness is owing, not to the statute which confers them, but to the inherent nature and character of the franchise granted. It is impossible to sever this essential element for it inheres in the thing granted so firmly and closely that severance is impossible.<sup>3</sup>

<sup>1</sup> *Le Claire v. Davenport*, 13 Ia. 210, overruling *Davenport v. Kelley*, 7 Ia. 109; *New Orleans v. Guillotte*, 12 La. Ann. 818.

<sup>2</sup> *Intoxicating Liquor Cases*, 25 Kan. 751, S. C. 37 Am. R. 284. In line with the general doctrine of the above case are the cases of *Mayor of City of Hudson v. Thorne*, 7 Paige, 261; *In re Ruth*, 32 Ia. 250; *City of Chicago v. Rumpf*, 45 Ill. 90. Although there is much conflict in the authorities it seems that the doctrine asserted in the *Slaughter*

*House Cases*, 16 Wall. 36, is the only defensible one.

<sup>3</sup> Mr. Tiedeman in his discussion of the subject says: "As long as the question is confined to the case of exceptional franchises, as, for example, ferries, railroads, bridges and the like, there seems to be no doubt of the power of the State to grant exclusive privileges." *Limitations of the Police Power*, 316. Judge Cooley discusses the question with care and ability and says: "Still, the legislature, when it grants

It is, and long has been, a principle of constitutional law that constitutions are to be interpreted in the light of existing things, for constitutions neither create things nor invent principles.<sup>1</sup> As a great statesman has said: "Written constitutions sanctify and confirm great principles, but the latter are in existence prior to the former." It is, therefore, the duty of the courts to interpret written constitutions with reference to existing things, and to organized society. Only organized society can frame constitutions and society frames them of necessity with reference to the known qualities of existing things. If this be true, then it seems clear that the framers of the constitution did not intend to prevent the grant of privileges that could not possibly be otherwise than exclusive, since it can not be inferred that they meant to deprive the community of such useful things as highways, ferries, railroads and the like. The denial of this conclusion involves the denial of the proposition that the legislature may authorize a public road to be built upon a designated line, or a turnpike to occupy a specified space, and, surely, it was never contemplated that the legislature should have no authority to grant the privilege to lay out and maintain a public road or a turnpike.

There is, however, a line which the legislature can not pass. It can not make an exclusive grant as against common right where the thing granted is not inherently exclusive. Legislation may not directly create an exclusive privilege in matters of common right, but necessity may do so. It is one thing to restrict the exercise of common right and quite another thing to create an extraordinary right or privilege and make it exclusive. In granting a right to use a highway for a street rail-

special privileges or franchises may undoubtedly make them exclusive. The distinction seems to be this: The following of the ordinary and necessary employments of life is a matter of right and can not be made to depend upon the State's permission or license." He also says: "But when the State gives permission to do something not otherwise lawful it may, in its discretion, make the gift exclusive. Thus it may

grant an exclusive ferry, or an exclusive right to erect a toll bridge, or to set up a lottery, because no one is wronged, because no one had such liberty before and, therefore, no one is deprived of anything by the grant." Cooley on Torts, 328.

<sup>1</sup> *State v. Denny*, 118 Ind. 449, 474; *State v. Noble*, 118 Ind. 350, 361; *Durham v. State*, 117 Ind. 477; Cooley's Const. Lim. (5th ed.) 73.

way the legislature makes that lawful, which, but for the grant, would be unlawful, for no citizen has a right to use a highway in any other than the usual modes, except where the legislature authorizes him to do so. But, as we have indicated, we do not believe that the doctrine we have stated can legitimately be pressed so far as to authorize the legislature to confer an exclusive privilege to reap all the profits of transporting passengers, except in cases where necessity produces that result, as it may sometimes do, as, for instance, where it is impossible to operate more than one railway upon the same street. The subject is not free from difficulty, but we think that our conclusions are sufficiently fortified by authority to resist attack.<sup>1</sup>

Important and difficult questions may arise in cases where the legislature, or the municipal officers, grant a general license to a street railway to occupy the streets of a city, and it is apparent that it may often be difficult to determine the extent and effect of such a general license. Some rights necessarily accrue to the company which secures the first grant, and yet some rights remain in the licensor, for it can not well be true that a railway company may hold a general franchise and not do anything toward rendering the public the service which forms the principal element that supports the right to grant a special privilege to use a highway. It is only upon the ground that the public welfare is promoted that grants of such privileges can be sustained, for special privileges can only be granted in cases where the public interest will be promoted. Eliminate this element and it is impossible to sustain the grant of a right to con-

<sup>1</sup> *City of Brenham v. Brenham Water Works Co.*, 67 Tex. 542; *Crescent City, etc., Co. v. New Orleans, etc., Co.*, 27 La. Ann. 138; *New Orleans Water Works Co. v. Rivers*, 115 U. S. 674; *State v. Milwaukee, etc., Co.*, 29 Wis. 454; *Mayor, etc., of Rome v. Cabot*, 28 Ga. 50; *Intendents and Town Council of Livingston v. Pippin*, 31 Ala. 542; *Mayor, etc., v. Hogan*, 9 Baxter, 495; *Morton v. Power*, 33 Minn. 521; *State v. Gas Light Co.*, 18 Ohio St. 262; *East St. Louis v. St. Louis, etc., Co.*, 98 Ill.

415; *City Council of Montgomery v. Montgomery Water Works*, 79 Ala. 233; *Norwich Gas Light Co. v. Norwich*, 25 Conn. 19; *Richmond, etc., Co. v. Town of Middletown*, 59 N. Y. 228; *Jackson Horse Car Co. v. Interstate Rapid Transit Co.*, 24 Fed. R. 306; *Hovelman v. Kansas City Horse R'y Co.*, 79 Mo. 632; *Atchison St. R'y Co. v. Mo. Pacific R'y Co.*, 31 Kan. 660; *Davis v. Mayor, etc.*, 14 N. Y. 506, S. C. 67 Am. Dec. 186.

struct and operate a railway in a street or road, for such a right is necessarily an exclusive one and, to a great extent, prevents the free use of the highway by all the citizens upon equal terms. In spite of all that can be done, the exercise of such a right does in some measure give the possessor of the right something in the nature of a monopoly, and to justify this it must appear that the public good demands that there should be some abridgment of the general and common right. It must follow that a mere general grant to use the streets of a city does not, of its own force and vigor, operate to exclude other companies and place it in the power of the licensee to use or decline to use the streets at its own pleasure.

If the company which secures the first grant actually occupies the streets it is authorized to use, then there is much reason for affirming that its right to the part of the street actually occupied and used is paramount and exclusive. By actually taking possession of the street and using it for the accommodation of the public, the company first in point of time does such acts as vest its rights. But to have this effect the company, as it seems to us, must take possession in good faith and for the purpose of constructing and operating such a railway as the grant contemplates. A colorable possession taken solely for the purpose of keeping out other companies and unaccompanied by acts indicating an intention to furnish reasonable facilities for the accommodation of the public ought not to be regarded as sufficient to vest a right under the general license. If, however, reasonable facilities are actually furnished, or preparations are in good faith really made for furnishing them, then the fact that one of the reasons which influenced the company is that of excluding other companies ought not to prevent the vesting of the granted right.

We very much doubt whether a general grant which would prevent the legislature or the municipal authorities from granting privileges to other companies would be valid in cases where the right to use the highway is left entirely to the licensee, for this, as we believe, would be a surrender of the police power which the constitution will not permit. The legislature can not bind itself not to legislate for the welfare of the public, and it

would seem to follow that it can not rightfully place itself in a position where it can not make provision for the public necessities. If it can not do this, then it can not make a grant which leaves it entirely in the discretion of a private corporation to provide, or decline to provide, the facilities for travel upon the highways which are demanded by the public welfare. We think there is sufficient reason for affirming that the legislature must retain the power to provide for the necessities of the public and that a general grant to occupy highways is only effective when something is done vesting the right granted and securing what the public requires. Until something is done vesting the granted privilege, it is within the legislative power to secure the welfare of the public by granting the necessary license to another company, although there may be a prior general grant.

While it is, as we believe, true that some act must be done vesting the inchoate right conferred by a general grant, still, we do not regard it as essential that manual possession should be taken of all of the streets or roads embraced in the general grant or license. If the company having the prior right enters upon the work of constructing a system, and with reasonable diligence and in good faith does actually construct a considerable part of the system it ought not to lose its rights, unless it has failed to comply with a proper demand to complete the system or has unreasonably delayed its completion. Much must necessarily depend upon the terms of the particular grant, but, nevertheless, there are fundamental principles which can not be excluded or impaired, and the chief of these is that the legislature can not surrender or barter away any substantial part of the police power.<sup>1</sup>

Conflicting claims asserted by rival companies claiming under general grants must often be settled by applying the rule that the first to rightfully occupy the street has the better right.

<sup>1</sup> It seems to us that the legislature may take place which may render it can not yield the right by a mere general grant not fully vested by actual or hurtful to the public to permit the use of such streets, and that in such cases constructive occupancy, to declare, the grant may be recalled, provided, whenever the public welfare demands, there has been no occupancy or use of that the company shall not lay tracks the street under it. in streets covered by the grant; changes



This statement, however, can not be regarded as more than a general expression of the rule, for so much depends upon the facts of each particular case that little more can be done than to state the rule in a very general way. It is true, however, that where there is a general grant, neither perfected nor vested, it becomes vested when a location and an appropriation is made.<sup>1</sup> We suppose that it must be true that a company possessing a general grant can not be divested of its rights until it has had a reasonable opportunity for vesting them by actually entering upon the work of constructing its tracks.

The railway company must accept the grant as an entirety or reject it. This general rule is applied with considerable strictness. The company must conform to the requirements of the ordinance or statute in constructing its road, and a failure to obey the statute will not be excused, although the railway as constructed does not, in fact, injure or obstruct the street to any greater degree than it would have done if it had been constructed in strict accordance with the statute.<sup>2</sup> It is held that the road must be kept and maintained as the statute requires.<sup>3</sup> The railway must be constructed upon the line designated in the statute or ordinance.<sup>4</sup> But where a railway company is authorized to construct a road along a designated street, it may construct it across all cross streets although the statute or ordinance may except such cross streets.<sup>5</sup> It is held that turn-outs

<sup>1</sup>In the case of the *Railway Co. v. Alling*, 99 U. S. 463, it was said: "When such location and appropriation were made, the title, which was previously imperfect, acquired precision and took effect as of the date of the grant. The settled doctrines of this court would seem to justify that conclusion." *Railroad Co. v. Smith*, 9 Wall. 95; *Schulenberg v. Harriman*, 21 Wall. 44; *Leavenworth, etc., R. R. Co. v. United States*, 92 U. S. 733; *Missouri, etc., R'y Co. v. Kansas Pacific R'y Co.*, 97 U. S. 491; *Titusville, etc., R. R. Co. v. Warren and Venango R. R. Co.*, 12 Phila. 642; *Waterbury v. Dry Dock, etc., R'y Co.*, 54 Barb. 388;

*Christopher, etc., Co. v. Central Cross-Town R'y Co.*, 67 Barb. 315.

<sup>2</sup>*Regina v. Toronto, etc., Co.*, 24 Q. B. (Can.) 454.

<sup>3</sup>*Attorney Gen. v. Toronto, etc., Co.*, 14 Grant's Chy (Can.), 673.

<sup>4</sup>*In re Metropolitan, etc., Co. (N. Y.)*, 19 N. E. R. 645. It has, however, been held that a slight deflection from the designated line will not impair the rights of the company. *Com. v. Wilkes Barre R. W. Co. (Pa.)*, 38 Am. & Eng. R'y Cas. 428, *n*; *City of Concord v. Concord Horse R. R.*, 18 Atl. R. 87.

<sup>5</sup>*State v. Newport St. R'y Co. (R. I.)*, 18 Atl. R. 161. See, also, *Chicago and*

can not be constructed unless authorized by the ordinance or statute.<sup>1</sup>

Where a street railway company is licensed to use a designated street, and it accepts the grant in the prescribed mode, it is the duty of the ministerial municipal officers, upon proper request, to take such steps as may be necessary to secure to the company the benefit of the privileges and franchises conferred upon it. In the event of the refusal of such an officer to perform his duty under the statute or ordinance the company will be entitled to a writ of mandate to coerce the performance of the duty. Thus, a surveyor whose duty it is to furnish lines and levels for the construction of a railway may be compelled to perform that duty by mandamus.<sup>2</sup>

We have called attention to the rule that a grant to a street railway company is regarded by the courts as an irrevocable contract, and we have said that although it is a contract, still, the contract does not impair the right of the State or its municipalities to exercise the police power, and we shall now consider some of the duties which may be imposed upon street railway companies in the exercise of that power.

It may be said, generally, that the State, or its duly authorized municipality, may require a street railway company to do whatever is required for the health, safety and welfare of the community, for the authority to enact measures for this purpose never passes from the sovereign, no matter what grants it may make. It must follow from this fundamental principle that all corporations take their rights and privileges subject to this general power which permanently resides in the State.<sup>3</sup> Under the

*Western R. R. Co. v. Dunbar*, 100 Ill. 110. It seems to us that the court, in the case last cited, construed the statute too strongly against the public. We think that where a right to locate a railway is given in general terms it does not deprive the municipal officers of the authority to determine what streets shall be used. We believe that the general words can not be construed to take away all power from the municipality, but that they must be deemed

to confer a right to locate under the control of the local authorities. The decision was by a divided court, and it is difficult for us to resist the conviction that the minority views are correct.

<sup>1</sup> *City of Concord v. Concord Horse R. R. (N. H.)*, 18 Atl. R. 87.

<sup>2</sup> *State, ex rel. St. Charles, etc., R'y Co. v. Cockrem*, 25 La. Ann. 356.

<sup>3</sup> In the case of the *Town of Westbrook v. New York, New Haven, etc., Co.*, 57 Conn. 95, S. C. 16 Atl. R. 724,

police power it is competent for the State, or one of its duly authorized municipalities, to compel a street railway company to so manage and operate its railway as to prevent danger to life or property. Under the wide sweep of the general power are necessarily embraced many incidental and subsidiary powers. Much in the matter of detail and upon questions of expediency and necessity must be left to the governing power. Whether it is necessary or expedient to require new or additional precautions is intrinsically a legislative and not a judicial question. When a regulation is prescribed by the legislature itself the courts can do no more than ascertain whether or not any constitutional provision is violated, and if they find that no constitutional right has been invaded, the statute must be upheld. Where the regulation is prescribed by a municipal corporation the field of judicial duty is much larger, for the courts must ascertain whether there is a constitutional statute authorizing the act of the municipality, whether the act is within the scope of the statute and is performed in the mode prescribed, and whether the regulation is a reasonable one. In determining whether the municipal by-law or resolution is reasonable, the courts do, it seems to us, exercise a power essentially legislative, for whether an act is or is not reasonable is a question, as a general rule, for the legislature, and it does not lose its inherent character by delegation to a political corporation. It is, perhaps, difficult to vindicate the doctrine that courts may overthrow the by-laws or ordinances of governmental subdivisions upon the ground that they are unreasonable, since what is or is not reasonable is not a question to be determined by fixed rules, and local officers are, as a general rule, in a position quite as favorable for reaching a satisfactory conclusion as the judges. But the rule that the courts may overturn such ordinances and

it was held that the enactment of a statute abolishing grade crossings was a valid exercise of the police power. It was said by the court in the course of the opinion that: "We might stop here, but we will add that the act in question is an exercise of the police power of the State. Its object is to change or remove certain conditions,

lawful in themselves, but which have become a source of danger to life and property. The remedy consists in requiring those charged with the duty of maintaining highways to change the conditions, and hereafter discharge their duties in such a manner as to avoid danger."

by-laws as they deem unreasonable is too firmly settled to be shaken.

Under the police power, a municipal corporation may enact ordinances or by-laws prohibiting a street railway company from running its cars at such a rate of speed as to endanger the safety of persons rightfully using the streets. But under the rule that by-laws will be condemned if unreasonable the courts may prevent the enforcement of a by-law or ordinance that unreasonably restricts the rate of speed. It is obvious that courts should interfere with the judgment of the municipal officers only in clear cases, for some discretion is unquestionably committed to them, and as long as they act within the scope of their authority, and do not abuse their discretion, they are free from judicial control. We suppose it clear that a municipal corporation may, within reasonable limits, regulate the places of stopping cars so as to prevent the unnecessary hindrance of travel, and that it may also prevent the unnecessary obstruction of the streets. These rights of the municipality can not, however, extend so far as to permit it to unnecessarily limit or restrict the operation of the railway, nor can they extend so far as to authorize any act that will destroy the franchise of the company.

It has been held under a municipal charter granting a city council power to "make, ordain and establish such by-laws, ordinances and regulations as shall appear to them requisite and necessary for the security, welfare, and convenience of said city, and for preserving health, peace, and good government within the limits of the same," that the council may lawfully enact and enforce an ordinance requiring a street railway company to keep down the dust by sprinkling its track.<sup>1</sup> It has also been

<sup>1</sup> City, etc., Ry. Co. v. Savannah, 77 Ga. 731, S. C. 4 Am. St. R. 106. The doctrine of the case cited will be found, on examination, to be well supported by the decisions in analogous cases, for the power to protect life, health, and property is very comprehensive. Railroad Co. v. Chenver, 43 Ill. 209; Robertson v. Railroad Co., 84 Mo. 119; Gahagen v. Railroad Co., 1 Allen, 187; Knobloch v. Railway Co., 31 Minn. 402; Whitson v. Franklin, 34 Ind. 392; Merz v. Railway Co., 14 Mo. App. 459; Railroad Co. v. Jersey City, 47 N. J. L. 286. It is held that an ordinance of a municipality regulating the speed of trains may control their movement in the yards of the company. Crowley v. Railroad Co., 65 Ia. 658; Green v. Canal Co., 38 Hun. 51. *Contra*, State v. Jersey City, 29 N. J. L. 170.

held that street railway companies take the privilege granted to them subject to the municipal authority to regulate the use of the streets as the necessities of the public may require, and that this authority extends so far as to vest in the municipality a right to change the track of the railway from one part of the street to another.<sup>1</sup> In accordance with the principle which we have heretofore stated,<sup>2</sup> it has been adjudged that a municipal corporation may temporarily remove the tracks of a street railway company if necessary to enable the municipal officers to construct a culvert under one of the streets of the city.<sup>3</sup> In an Iowa case it is held that where the ordinance grants authority to lay down two tracks, the city can not limit the company to one track, but it is intimated in the opinion that if the second track wrought an injury, the city might require its removal.<sup>4</sup> In an-

<sup>1</sup> *West Philadelphia Passenger Ry. Co. v. The City of Philadelphia*, 10 Phila. 70. "Private corporations," said the court, "take their rights subject to the rights of individuals and communities; and the strong presumption of law is always against unconditional adverse privileges." It was also said: "To this must be added the general principle that where a private corporation accepts the grant of a franchise upon a highway, over which a municipality possesses a general power of regulation and control for public purposes, it accepts its special privileges upon the implied condition that it holds them subject to the reasonable and necessary exercise of the general power of the municipality. 'Until the legislature overrides the local authorities, their jurisdiction is not ousted.' *Philadelphia v. Lombard, etc., Ry.*, 3 Grant, 405."

<sup>2</sup> *Ante* p. 573.

<sup>3</sup> *North Pennsylvania Railroad v. Stone*, 3 Phila. 421.

<sup>4</sup> *The City of Burlington v. Burlington St. Ry. Co.*, 49 Ia. 144. In that case it was said: "It is urged that the city in the exercise of its police power, may forbid the laying of the double

track. The question presented by this position is not in the case, for the reason that it is not shown in the pleadings that the proposed double track would operate to the inconvenience of the public or would work an injury to the city or any of the people. It is not claimed that the proposed improvement would be a nuisance, nor is it shown that the best interests of the city or the people require it to be forbidden. If, therefore, the city retains, in the exercise of the police power, the authority to forbid the construction of the double track, the facts present no case for the exercise of that power." The question suggested by the line of reasoning adopted by the court is delicate and difficult. Who shall determine what is required by the necessities of the public or the welfare of the community? If the question is a legislative one, then, clearly enough, the courts can not interfere, nor can they interfere if the power is a discretionary one. We have no doubt that the courts may prevent an abuse of power, but, where there are facts invoking the exercise of discretion in deciding what is and what is not required by the public welfare, we should seriously

other case the general question of the nature and extent of municipal control was elaborately discussed, and it was held that compelling a street railway company to number each of its cars and pay a designated license fee for each of them was a valid exercise of the police power vested in the municipality.<sup>1</sup>

It seems to us that there is sound reason in the rule laid down by the Pennsylvania cases, and that some of the courts have unduly extended the decisions holding that a charter is a contract at the expense of the public and to the profit of the private corporation. This we say, for the reason that a contract, no matter with whom made or how made, can not impair the police power and this is a matter of which every person, artificial or natural, who secures special privileges under a legislative or municipal grant, must take notice. It is, at all events, not to be presumed or implied that the power to regulate and control is surrendered even in part without the expression of the intention to surrender the power in clear words, and it is, indeed, doubtful whether it is possible in any event or under any circumstances to surrender or alienate any part of this sovereign power.

The grant of a right to use the streets of a city gives the company rights superior to those of persons riding or driving along the street. A street railway company must necessarily possess greater rights than those of the ordinary traveler, for, as is very evident, the cars of the company can not give and take the

doubt the right of the courts to control or direct the exercise of that power.

<sup>1</sup> Frankford, etc., Co. v. City of Philadelphia, 58 Pa. St. 119. "But the grant," said the court, "of a privilege to carry passengers in cars over the streets does not necessarily involve exemption from liability to municipal regulation. It is not the bestowal of a right superior to the rights enjoyed by passenger carriers generally, whether such carriers be natural or artificial persons. The facilities for the use of the right may be greater, but the right itself can be neither more nor less than a natural person possesses. It is to be presumed

that when the legislature creates a corporation, and authorizes it to carry on a specified business within the limits of a municipal corporation, the business is intended to be conducted under the restrictions, rules, and regulations that govern the same business when transacted by others within the corporate limits." The court referred to the cases of the Comm'rs v. The Northern Liberties Gas Co., 2 Jones, 318, and Trenton Water Works Company's Case, 6 Pa. Law J. 32, with approval, and, to some extent, denied the doctrine asserted in the case of the Mayor v. The Second St. Ry. Co., 33 N. Y. 261.

road, but must move upon the track. It is, therefore, the duty of those traveling in the ordinary mode to leave the track in order that the movement of the cars may be unimpeded. It is held without dissent, that to the cars of the company must be yielded the right of passage and that horsemen and vehicles must leave the track when cars approach.<sup>1</sup>

The right vested in a street railway company is of such a nature as to make it wrongful for any one to so negligently use that part of the street occupied by its tracks as to unnecessarily injure them. An extraordinary use of that part of the street upon which the tracks are laid may subject the person who so uses it, and who fails to exercise ordinary care to protect the tracks from injury, to an action. Thus where a person engaged in moving a house negligently injured the track of a street railway, it was held that he must respond in damages.<sup>2</sup>

Under the rule to which we have often referred, a street railway company takes under its charter or license only such rights as are expressly conferred or are clearly implied, and it therefore acquires only a right to use the road or street for the purpose of moving its cars and transporting passengers. It does not acquire any right, under a general grant, to use a highway for the storage of its cars, or other similar purposes. It is very doubtful whether a municipal corporation can grant a right to use the streets for any other purpose than that of moving cars over the tracks, for to permit any other use would be to

<sup>1</sup> Hegan v. Eighth Ave. Ry. Co., 15 N. Y. 380; Whitaker v. Eighth Ave. Ry. Co., 51 N. Y. 295; Adolph v. Central Park R. R. Co., 65 N. Y. 554; Wilbrand v. Eighth Ave. Ry. Co., 3 Bosw. 314; Chicago, etc., Co. v. Bert, 69 Ill. 388.

<sup>2</sup> Toronto, etc., Co. v. Dollery, 12 Ontario Appeal, 679. In this case it was held that an owner who employed an independent contractor to move the house was liable, and that the case fell within the rule *respondeat superior*. The case is an instructive one, and cites Peachey v. Rowland, 13 C. B. 182; Overton v. Freeman, 11 C. B. 868; El-

lis v. Sheffield Gas Co., 2 E. & B. 769; Hole v. Sittingbourne R. R. Co., 6 H. & N. 488; Hughes v. Percival, 8 App. Cases, H. L., 443; Angus v. Dalton, 6 App. Cases, H. L., 740; Tarry v. Ashton, 1 Q. B. D. 318; Day v. Green, 4 Cush. 437. The case last named was one against a person for moving a house, and the court held, Shaw, C. J., delivering the opinion, that there was no common law right to move a house along public streets, but that it might be done under a license from a municipal corporation provided reasonable care was used to prevent the obstruction of the streets.

allow the streets to be used for a different purpose than that for which they were set apart. As we have seen, street railway companies are allowed to use highways upon the ground that they furnish means of travel, and thus promote the public welfare and convenience. To permit them to use the streets or roads for any other purpose than that of transporting passengers would be an invasion of the public right as well as an infringement of the private rights of abutting owners.

It is the duty of a street railway company to so maintain and operate its railway as not to unnecessarily impede travel or obstruct the highway. It has no right to use more of the highway than is reasonably necessary to enable it to conduct its legitimate business, nor has it any right to unnecessarily interfere with the easement of access of the adjoining lot owners.<sup>1</sup> In short, a railway company ordinarily acquires such rights, and such rights only, as are necessary to enable it to enjoy in a reasonable mode the franchise granted to it. The general doctrine we are considering is illustrated by a case in which it was held that the company was liable for so negligently removing snow from its track as to make the street unsafe.<sup>2</sup> In another case the question as to the duty of a street railway company was considered and it was held, in substance, that it must exercise its privileges with a due regard to the rights of the public to travel the highway.<sup>3</sup> In a Maryland case it was held that a

<sup>1</sup> *Prime v. Twenty-Third St. R'y Co.*, 1 Abbott New Cases (N. Y.), 63; *Hussner v. Brooklyn City R. R. Co.*, 114 N. Y. 433, S. C. 11 Am. St. Rep. 679.

<sup>2</sup> *Wallace v. Detroit City R'y*, 58 Mich. 231. It was said by the court that: "As it was decided in Bowen's case, we think that any disposition of the snow must be made with due reference to the rights of travel upon the highway."

<sup>3</sup> *Bowen v. The Detroit City R'y*, 54 Mich. 496, S. C. 52 Am. R. 822. "Although the legislature," said the court, "by implication granted the right to

the defendant to deposit the snow on the street, the company notwithstanding was bound to exercise the right conferred with the rights of the community in the use of the street, and it was also bound to use the highest degree of care to prevent injury to persons and property of those affected by its acts." The rule as the court states it, is perhaps rather more stringent than the doctrine of analogous cases warrants, for, as it seems to us, if a street railway company uses ordinary care and diligence to prevent injury to travelers and property it will not be liable.



street railway company has no right to throw masses of snow into a gutter and thus so obstruct the flow of water as to cast it upon private property.<sup>1</sup> It was, however, declared in the case referred to, that the company was not bound to haul the snow away in any event, although it was bound to exercise ordinary care. We think the doctrine was too broadly stated when it was affirmed that the company was not bound to remove the snow, for, as we believe, the company was bound to do whatever ordinary care and diligence made necessary in order to enable the public to use the street in a reasonable manner. We do not believe that a street railway company can clear away its track and bank up the snow so as to make it dangerous to use the street, or so as to prevent travelers from leaving the track with safety in order to make way, as it is their duty to do, for the passage of the cars. A street railway company which accepts a grant or license impliedly agrees that it will use due care not to unnecessarily impede travel or to make the use of the street hazardous. The burden which it assumes in conjunction with the benefit which it obtains is a continuing one, and it must bear it, although to do what due care and diligence requires may sometimes entail considerable expense. We know of no principle which will permit a railway company licensed to use the public roads or streets to clear away its tracks and do no more although in doing this it may make the use of the street dangerous. If the work of clearing its track necessarily obstructs passage, then the company must do all that ordinary care requires to remove the obstruction and prevent injury to persons or property. Where the track is cleared for its own convenience it must do what is reasonably necessary to make the part of the street not occupied by its tracks

<sup>1</sup> Short v. Baltimore Passenger Ry. Co., 50 Md. 73. In speaking of the duty of the company the court said: "It was obliged to exercise ordinary care and prudence, not only in removing the snow from the track, but also in throwing it on the street." This, as we think, may be accepted as an accurate statement of the general rule, but, as we have endeavored to show in the text,

the court unduly restricted the operation of the principle it laid down as the ruling one. As the question presents itself to our minds, it seems clear that the company was bound to do whatever ordinary care required, and if ordinary care required the removal of the snow, then it was the duty of the company to remove it.

reasonably safe, for it can not for its own accommodation obstruct it so as to endanger travelers. Any other rule than the one we have suggested would make the rights of the company so far superior to those of the public as to work rank injustice, and this certainly is a result not contemplated by the law. The privileges secured by the company are not so far reaching or so exclusive as to exempt them from using due care; on the contrary, the privileges are granted upon the implied condition that they shall be used with due regard to the prior and superior rights of the public in the highway.<sup>1</sup>

Subject to the superior right of passage the public may freely use the street or road occupied by the tracks of a street railway company. In using the street for the purpose of travel in the ordinary mode, travelers are in no sense trespassers whatever the motive power employed in drawing the cars may be. The public retains its right to make ordinary use of the street or road, and its grantee or licensee takes the privileges granted upon the implied condition that this right of the public shall not be unnecessarily impaired or lessened. This is the general rule as declared by all of the decided cases.<sup>2</sup> But it is held that

<sup>1</sup> What has been said in the text is a just deduction from the adjudged cases. In *People v. Batchellor*, 53 N. Y. 520, it is held that a corporation aside from the privilege of transporting passengers possesses only private rights, and it is quite clear that the right to transport passengers does not carry the right to encumber or obstruct the street. After a full use of the street for the movement of cars, "a further use becomes an obstruction, and it is the duty on the part of the person causing the obstruction to remove it." *People v. Cunningham*, 1 Denio, 524; *Prime v. Twenty-Third St. Ry. Co.*, 1 Abbott's New Cases, N. Y. 63, 71. In the case last mentioned, it was said: "The use of no more of the street is granted than is necessary for the operation of the railway. After the snow has been cleared from the track, its remaining on the street on the side has

nothing to do with it, and does not in anyway affect the operation of the railway, using that term in whatever way it may be used. The deposit of the snow on the side has the same relation to the corporation that a deposit elsewhere would have, and no other. The use of the side has no other relation to the full existence of the franchise, than the stables for the horses, and the houses for the cars." It was also said: "The convenience and inexpensiveness of using the street at the side of the track for a permanent place for snow do not of themselves create any necessity that this use of the street is a part of the grant."

<sup>2</sup> *Smedis v. Brooklyn, etc., R. R. Co.*, 88 N. Y. 13; *Adolph v. Central Park, etc., Ry. Co.*, 65 N. Y. 554; *Frick v. St. Louis, etc., R. R. Co.*, 75 Mo. 595; *Kansas Pacific R. R. Co. v. Pointer*, 9

there is, at least, one exception to this general rule. In a case which was strongly contested and very fully considered, it was held that a street railway company was not bound to permit the use of the space covered by its tracks by a rival omnibus line although it was bound to permit it to be used by ordinary travelers.<sup>1</sup> We suppose that the rule declared in the case referred to can only apply where the competing line uses the street longitudinally, for we can conceive no reason why it can be held to apply to crossings. The doctrine is not one to be extended, although it is probably true that in the particular instance a just rule was laid down and correctly applied. We suppose that a railroad track is property, but we suppose, also, that if tracks are laid in a road or street the owners of them must submit to the use of the street in the ordinary modes of travel although the effect may be to injure their property by wear and tear. It is, however, probably true that a rival company can not continuously use the property, but we do not believe that it follows from this that a competing omnibus or stage line may not use the same street and occasionally drive upon the track in order to enable other vehicles to pass. It is only when the rival stage or omnibus line makes a continuous use of the space occupied by the track that its owners can be justly deemed wrong-doers. We should hesitate to assent to a rule which would enable a street railway company to practically drive a competing omnibus line from the street, although we incline to

Kan. 620; Louisville, etc., R. R. Co., *v.* Phillips, 112 Ind. 59; Campbell *v.* Boyd, 88 N. C. 129, S. C. 43 Am. Rep. 740; Kay *v.* Penna. R. R. Co., 65 Pa. St. 269; Davis *v.* Chicago, etc., Co., 58 Wis. 646; Bennett *v.* Railroad Co., 102 U. S. 577.

<sup>1</sup>Citizen Coach Co. *v.* Cadem Horse R. R. Co., 33 N. J. Eq. 267, S. C. 36 Am. R. 542. Beasley, C. J., said: "I have no idea that by having thus laid the track such company acquired the exclusive right to use the space so occupied, or any part of such space. That space still remained part of the public street, open, in its entire area, to the use

in the ordinary way of every citizen. Such citizens, under such conditions, could use as a part of the street, either transversely or longitudinally, the rails so laid. I would refer only so far to the authorities as to say, that with almost entire unanimity, they maintain this right in the public as against such chartered rights as the one now in question." Other cases maintain the right of a street railway company to exclude rivals. Brooklyn Central, etc., Ry. Co. *v.* Brooklyn City Ry. Co., 32 Barb. 358; Metropolitan Ry. Co. *v.* Quincy Ry. Co., 12 Allen, 262; Cotton *v.* Griest, 1 Am. & Eng. R. R. Cases, 474, *n.*

the opinion that it might prevent the competing line from continuously using the space occupied by its track. Coaches and omnibuses, as every one knows, may run upon any part of the roadway, and they are, therefore, unlike cars which can only run upon tracks prepared for them. For this reason it is quite difficult to perceive a close resemblance between cases in which the controversy is between rival street railway companies and cases in which the controversy is between a street railway company and an omnibus or stage company. The analogy is, at all events, so faint as not to possess much, if any, probative force. The firmly settled rule is that a street railway company takes its franchise subject to the right of the public to use the street in the ordinary mode, and there is fair reason, at least, for holding that any one, whether the owner of omnibuses or not, may use the street, provided no special or continuous use is intentionally made of the space occupied by the tracks of the railway company. It has long been the rule—certainly since the decisions of the Supreme Court of the United States in the bridge cases—that a privilege is not exclusive unless clearly made so by the statute, and we are not quite prepared to assent to the doctrine that the general grant of a right to construct a railway in a street will authorize the grantee to exclude rival stage lines from the street.

A street railway company acquires a right in the street it is licensed to occupy which may be sold or transferred. The franchise conferred by a statute or an ordinance is the property of the company, and may be mortgaged.<sup>1</sup> A sale upon a decree of foreclosure will vest the franchise in the purchaser.<sup>2</sup> It

<sup>1</sup> Sixth Avenue R. R. Co., 72 N. Y. 330; *People v. Stutevant*, 9 N. Y. 263, S. C. 59 Am. Dec. 536.

<sup>2</sup> In the case of the New Orleans, etc., Co. v. Delamore, 114 U. S. 501, it was held, that: "Where there has been a sale of railroad property under a mortgage authorized by law covering its franchise, it is now settled that the franchises necessary to the use and enjoyment of the railroad pass to the purchaser." In another case it was said: "The franchise of being a corporation

need not be implied as necessary to secure to the mortgage bond holders or the purchaser at a foreclosure sale the substantial rights intended to be secured. They acquire the ownership of the railroad and the property incident to it, and the franchise of maintaining and operating it as a road." *Memphis, etc., Co. v. Railroad Comm'rs*, 112 U. S. 609, 619. See, also, *People v. Brooklyn, etc., Co.*, 89 N. Y. 75; *Brooklyn Central R. R. Co. v. Brooklyn City R. R. Co.*, 32 Barb. 360.

follows from the principle stated that the purchaser upon a foreclosure sale, whether the purchase be made by an individual<sup>1</sup> or by a corporation, may operate and maintain the railway upon the same terms and conditions as those upon which the mortgagor held the franchise. It is the general rule that a sale of a part of a railway can not be made upon execution, and this rule must obtain to a great extent in sales upon decrees of foreclosure, since the public are interested in the existence of the railway, and the franchise is essentially an indivisible right.<sup>2</sup> It is probably true that there may be cases where the railway is severable and parts may be sold, but such cases, if any such there are, must be deemed exceptional ones.

A street railway company licensed to use the streets of a city within a limited time must construct its road within the time designated, otherwise it will have no right to use the streets.<sup>3</sup> The right conferred by the license does not outlast the time fixed by the licensor for the construction of the railway. If the company fails to construct its railway within the time limited it loses its franchises and can not use the streets without a new grant.<sup>3</sup> Where the condition of the grant is that the company

<sup>1</sup> *People v. Brooklyn, etc., Co.*, 89 N. Y. 75. See, also, *Shields v. Ohio*, 95 U. S. 319.

<sup>2</sup> *Miller v. Dows*, 94 U. S. 444; *Gue v. Tide Water, etc., Co.*, 24 How. 257; *Covington Drawbridge Co. v. Shepherd*, 21 How. 112; *East Alabama, etc., Co. v. Doe*, 114 U. S. 340; *Thomas v. Railroad Co.*, 101 U. S. 71; *Black v. Delaware, etc., Co.*, 22 N. J. Eq. 130; *Louisville, etc., Co. v. Bony*, 117 Ind. 501; *Midland R. R. Co. v. Wilcox (Ind.)*, 23 N. E. R. 506.

<sup>3</sup> *Atchison Street R. W. Co. v. Nave*, 38 Kan. 744, S. C. 5 Am. S. R. 800; *G. C. R'y Co. v. G. C. S. R'y Co.*, 63 Tex. 529; *City of Detroit v. Detroit City R'y Co.*, 37 Mich. 558; *Street R'y Co. v. West Side R'y Co.*, 48 Mich. 433, S. C. 7 Am. & Eng. R. W. Cas. 95; *New York, etc., Co. v. Railway Co.*, 50 Barb. 285; *Market St R'y Co. v. Central R'y*

*Co.*, 51 Cal. 583; *City of Chicago v. Chicago, etc., Co.*, 105 Ill. 73; *Chicago, etc., Co. v. Story*, 73 Ill. 541; *Matter of Brooklyn, etc., R. R. Co.*, 72 N. Y. 245. See, also, *Toledo, etc., Co. v. Johnson*, 49 Mich. 148; *Oakland R. R. Co. v. Oakland, Brooklyn, etc., Co.*, 45 Cal. 365. Some of the cases hold that the failure to construct the railway within the time limited does not operate to extinguish the franchise, but operates simply as a defeasance, leaving an option in the licensors. *Hovelman v. Kansas City, etc., R'y Co.*, 79 Mo. 632; *People v. President, etc., of Manhattan Co.*, 9 Wend. 351. It seems to us that the doctrine of *Hovelman v. Kansas City, etc., R'y Co.*, *supra*, is not sound. We think the true doctrine is that asserted in the other cases cited, and that as said in *Atchison St. R'y Co. v. Nave*, *supra*. "Until the license is ac-

shall have notice that it is required to construct its railway under the grant, then notice is essential in order for the municipal corporation to withdraw the license or to defeat the right of the railway company to use the street. What the notice shall be must, of course, be determined from the terms of the grant.<sup>1</sup> Where an ordinance provides that a railway company shall build a railway upon designated streets within a limited time, the municipality may, it has been adjudged, grant the privilege to another upon the failure of the old company to construct its railway within the time limited by the ordinance.<sup>2</sup>

It is the duty of a street railway company to exercise ordinary care and diligence to prevent injury to persons lawfully traveling the street or road occupied by its tracks. It is bound to know that the public may use the entire street or road when not in actual use by its cars, and it must employ reasonable means to prevent injury to those who it knows may rightfully so use the road or street, for this knowledge requires that it shall exercise care and diligence to make it reasonably safe to travel the highway in the ordinary mode.<sup>3</sup> If the company omits to exercise ordinary care, and thus causes injury to a person in rightful and careful use of the street or road, it must respond in damages. In one case the court instructed the jury that a street railway company "had no right to so occupy the street and use the same with its cars as to make it extremely dangerous to cross the street at all times," and it was held on appeal that the company could not successfully complain of the

cepted and used no right vests in the railway company, and it may be revoked by the city council; and after the time within which it may be availed of expires, the license lapses, and no revocation is needed to terminate the same." The only acceptance that can be effective to fasten the right of the grantee is such an acceptance as the grant prescribes, and where use is essential to create a complete right use must be shown or the grant fails.

<sup>1</sup> In the case of the Fort Worth R'y Co. v. Rosedale R'y Co., 68 Tex. 169, it seems to have been assumed that the

adoption of an ordinance was sufficient notice.

<sup>2</sup> Fort Worth R'y Co. v. Rosedale R'y Co., *supra*. The municipal officers may, of course, extend the time for the construction of the railway. McNeil v. Chicago City R'y Co., 61 Ill. 150. See, also, Omnibus R. R. Co. v. Baldwin, 57 Cal. 160, S. C. 1 Am. & Eng. R. R. Cases, 316.

<sup>3</sup> Shea v. Potrero, 44 Cal. 414; Government St. R'y v. Hanlon, 53 Ala. 70; Railroad Co. v. Norton, 24 Pa. St. 465, S. C. 64 Am. Dec. 672.

instruction.<sup>1</sup> It was also held in the same case that the plaintiff had a right to select a point at which to cross, and that "he had a right to go where he chose." It is held that it is the duty of those in charge of a car to give notice or warning of its approach.<sup>2</sup> In one case it was said to be "gross negligence" for a driver to twist the lines upon the brake, turn his back and give his attention to other matters.<sup>3</sup> Where the ordinance requires a street railway company to keep "a lookout" a negligent failure to comply with the requirement will make the company liable to one who thereby sustains an injury.<sup>4</sup> So, where an ordinance prohibits a street railway company from running its cars at a greater rate of speed than that prescribed, a disobedience furnishes evidence of negligence,<sup>5</sup> but disobedience of such an ordinance is held not to be conclusive evidence of negligence on the part of the company.<sup>6</sup> The Supreme Court of Nebraska has held that the driver of a horse-car on a street railway must sit or stand on the front platform or place provided for him, must keep control of the horses and car, and must exercise a reasonable degree of watchfulness and care to prevent injury to persons traveling on or crossing the street.<sup>7</sup>

<sup>1</sup> *McClain v. Brooklyn City R'y* (N. Y.), 22 N. E. R. 1062.

<sup>2</sup> *Johnson v. Hudson River R'y Co.*, 20 N. Y. 65. See *Welsh v. Jackson, etc., Co.*, 81 Mo. 466.

<sup>3</sup> *Mangam v. Brooklyn City R'y Co.*, 36 Barb. 230, affirmed, 38 N. Y. 455. See, also, *Montfort v. Schmidt*, 36 La. Ann. 750; *Citizens St. R'y Co. v. Carey*, 56 Ind. 396.

<sup>4</sup> *Hays v. Gainesville, etc., R'y Co.*, 70 Tex. 602, S. C. 8 Am. St. R. 624.

<sup>5</sup> *Baltimore, etc., R'y v. McDonnell*, 43 Md. 534; *Citizens St. R'y Co. v. Steen* (Ark.), 19 Am. & Eng. R'y Cas., 30.

<sup>6</sup> *Hanlon v. South Boston, etc., R'y Co.* (Mass.), 29 R'y Cases, 18.

<sup>7</sup> *Brooks v. Lincoln Street R'y Co.*, 22 Neb. 816, S. C. 36 N. W. R. 529. The cases upon the general subject are quite numerous, and exhibit many pe-

culiar features and disclose some conflict of opinion, but we can not comment upon them in detail. *Hyland v. Yonkers, etc., R'y Co.*, 4 N. Y. Supp. 305; *Brown v. Twenty-Third Avenue R'y Co.*, 4 N. Y. Supp. 192; *Cords v. Third Avenue R'y Co.*, 4 N. Y. Supp. 439; *Gallagher v. Coney Island R'y Co.*, 4 N. Y. Supp. 870; *Wright v. Third Avenue R'y Co.*, 5 N. Y. Supp. 707; *Lamb v. St. Louis, etc., R'y Co.*, 33 Mo. App. 489; *Liddy v. St. Louis, etc., R'y Co.*, 40 Mo. 506; *Meyer v. Lindell St. R'y Co.*, 6 Mo. App. 27; *Dunn v. Cass Avenue, etc., R'y Co.* (Mo.), 11 S. W. R. 1009; *Unger v. Forty-Second St. Ry. Co.*, 51 N. Y. 497; *Pendleton Street R'y Co. v. Shires*, 18 Ohio St. 255; *Pendleton St. R'y Co. v. Stallman*, 22 Ohio St. 19. See, generally, *Buzby v. Philadelphia, etc., Co.*, 126 Pa. St. 559,

The duty of a street railway company, as indicated by what has already been said, is not simply to use ordinary care and diligence to avoid injury by collisions with vehicles moving upon the road or street, or with persons walking on the highway, but it must also exercise ordinary care and diligence in conducting its business and in maintaining its tracks so as to prevent injury to persons rightfully using the road or street. If it makes a street dangerous by its own negligent act it is liable, so if it places objects alongside of its tracks which are likely to frighten horses, it may be compelled to respond in damages to one who sustains an injury from its wrong. It is not held to an extraordinary degree of care in the conduct of its business, but it is held to the exercise of ordinary care.<sup>1</sup>

There is some conflict in the cases as to whether a street railway company can be held liable for a willful wrong of one of its drivers.<sup>2</sup> In view of the fact that it is now quite well settled, that corporations are liable for the willful acts of their employes when performed in the general line of the service in which the employes are engaged, it seems clear that street railway companies must be held liable for the willful wrongs of their drivers and conductors within the scope of their employment. The cases which declare a different rule are founded upon the old doctrine of the English courts which exculpated a master from liability for the willful act of his servant, but that rule has been

S. C. 17 Atl. R. 895; *Griveaud v. St. Louis, etc., R'y Co.*, 33 Mo. App. 458; *Watson v. St. Paul, etc., R'y Co.* (Minn.), 43 N. W. R. 904. As to what damages may be recovered, see *Chicago, etc., R'y Co. v. Ingraham* (Ill.), 23 N. E. R. 350. In *Mathews v. London St. Tramways Co.*, 60 L. T. R. 47, a passenger in an omnibus was injured by a collision with a car, and the court held that there might be a recovery notwithstanding the negligence of the driver of the omnibus.

<sup>1</sup> *Fitts v. Cream City R'y Co.* (Wis.), 15 Am. & Eng. R'y Cases, 462; *Gray v. Second Avenue R'y Co.*, 65 N. Y. 561; *Lowrey v. Brooklyn City R'y Co.*,

4 Abbott's New Cases, 32; *Wooley v. Grand, etc., R'y Co.*, 83 N. Y. 121; *McKenna v. Metropolitan, etc., R'y Co.*, 112 Mass. 55; *Osgood v. Lynn*, 130 Mass. 492; *McMahon v. Second Avenue R'y Co.*, 11 Hun. 347; *Lee v. Union R'y Co.*, 12 R. I. 383; *Citizens' Passenger R'y Co. v. Ketcham* (Pa.), 15 Atl. R. 733.

<sup>2</sup> Affirming that liability exists. *Berke v. Twenty-Third Avenue R'y Co.*, 4 N. Y. Supp. 905; *Stewart v. Brooklyn and Cross-Town R'y Co.*, 90 N. Y. 588; *Shea v. Sixth Avenue R'y Co.*, 62 N. Y. 180. See *Day v. Brooklyn, etc., R'y Co.*, 76 N. Y. 593.



much relaxed if not entirely overthrown in so far as it affects the liability of corporations.

It is agreed that contributory negligence by a person using a street will defeat a recovery against a street railway company for personal injuries although the company may have been negligent. The general principle is well settled and very easily stated, but the application of the principle is very difficult. The diversity of opinion upon what will or will not constitute such contributory negligence as will bar an action is so great that it is impossible to extract any general rule from the adjudged cases. It is, indeed, very doubtful whether it can be accurately said that there is any general rule, for cases are decided, for the most part, upon their own particular facts. It may be said, to be sure, that a man must exercise such care as an ordinarily prudent person would exercise under like circumstances, but this general statement is not, it must be owned, although it is one generally approved, of much real practical value, nor does it go very far toward removing the difficulties that one encounters in exploring the decided cases. The best course, perhaps, that can be pursued is to ascertain and state in a short way what the courts have decided on this subject. In an Illinois case it was held that crossing a street occupied by street railway tracks, without first stopping and looking is not negligence as matter of law, and that this is so "whether the cars accustomed to run thereon are horse-cars or grip-cars."<sup>1</sup> The New York rule is that a plaintiff is "not at liberty to take even doubtful chances of the consequences of crossing the track in the face of danger or in reliance upon the successful attempt of the driver to slack the speed of the horses."<sup>2</sup> In a Pennsylvania case a person alighted from a cable car and without looking turned sharply around the car and was struck by a car on another track, and it was held that he was guilty of such

<sup>1</sup> *Chicago City R'y Co. v. Robinson*, 127 Ill. 9, S. C. 18 N. E. R. 772. Citing *Baxter v. Railroad Co.*, 119 Ill. 586, S. C. 9 N. E. R. 263. *v. Savage*, 45 N. Y. 191; *Belton v. Baxter*, 54 N. Y. 245; *Davenport v. Railroad Co.*, 100 N. Y. 632, S. C. 3 N. E. R. 305. See *Moebus v. Hermann*,

<sup>2</sup> *McClain v. Brooklyn City R. R. Co.* (N. Y.), 22 N. E. R. 1062; *Barker*

contributory negligence as defeated a recovery.<sup>1</sup> The same court held in another case that it was contributory negligence for a man to step from a moving street car with his back towards the street.<sup>2</sup> In still another case in the same court it was adjudged that the plaintiff was guilty of contributory negligence in attempting to get on a car when he saw another approaching and near the one he was attempting to get upon.<sup>3</sup> It has been held that one who stands on the railing of a street car and is struck by a passing car is not necessarily guilty of such contributory negligence as will bar a recovery, but upon this point there is much conflict among the authorities.<sup>4</sup> By some of the courts it is held, that, as the cars can not give and take the road, the presumption in cases of collisions where the vehicle is moving side by side with the car is that the plaintiff was guilty of contributory negligence.<sup>5</sup> This presumption certainly can not be regarded as a conclusive one, for, as we think, the only force that can justly be assigned it is that where no explanatory evidence is given the inference is that the plaintiff was in fault, but when explanatory evidence is adduced the question becomes one of fact to be submitted to the jury under proper instructions.<sup>6</sup> It is laid down by many of the cases that the same degree of care is not required of persons crossing or passing along street railway tracks that is required in the case of per-

<sup>1</sup> *Buzby v. Philadelphia, etc., Co. (Pa.)*, 17 Atl. R. 895. The court cited *Schmidt v. McGill*, 120 Pa. St. 412, S. C. 14 Atl. R. 383.

<sup>2</sup> *Beattie v. Railroad Co. (Pa.)*, 1 Atl. R. 574.

<sup>3</sup> *Rose v. Railway Co. (Pa.)*, 12 Atl. R. 78. Compare *Stager v. Railway Co.*, 12 Atl. R. 821.

<sup>4</sup> *Geitz v. Milwaukee City R'y Co. (Wis.)*, 39 N. E. R. 866; *Railway Co. v. Lee (N. J.)*, 14 Atl. R. 883; *Railway Co. v. Lauderbach (Pa.)*, 3 Atl. R. 672; *Dahlberg v. Railway Co. (Minn.)*, 21 N. W. R. 545; *Neslie v. Railroad Co. (Pa.)*, 6 Atl. R. 72. In *Brown v. Broadway, etc., R'y Co.*, 50 N. Y. Superior Ct. R. 106, it was held that the rule of

contributory negligence applies to a man marching in a procession. The cases which follow illustrate many and various phases of the general subject. *Philadelphia, etc., R'y v. Bernheimer (Pa.)*, 17 Atl. R. 477; *Connolly v. Knickerbocker, etc., R'y Co. (N. Y.)*, 21 N. E. R. 101; *Weil v. Dry Dock Co.*, 5 N. Y. Supp. 833; *Howland v. Union, etc., R'y Co. (Mass.)*, 22 N. E. R. 434; *Omaha Horse R'y Co. v. Doolittle*, 7 Neb. 481; *Tanner v. Louisville, etc., R'y Co.*, 60 Ala. 621.

<sup>5</sup> *Suydam v. Grand St. R'y Co.*, 41 Barb. 375; *Siegel v. Eisen*, 41 Cal. 109.

<sup>6</sup> *Lynam v. Union, etc., R'y Co.*, 114 Mass. 83.

sons crossing or walking along the tracks of ordinary railroads. There is a solid foundation for this distinction, and to sanction a rule that would impose the same obligation upon persons using the tracks of a street railway as that which obtains where the plaintiff crosses or walks along an ordinary railroad track, would be to practically surrender a street to the railway company. This result principle and authority forbid.<sup>1</sup> In a Pennsylvania case it was held that where the owner of a horse carelessly unhitched it he could not recover, although it was frightened by a cable car and caused to run away and come into collision with the car.<sup>2</sup>

It is the duty of a street railway company to run its cars with a due regard to the rights of infirm persons, aged persons and children of tender years, for all classes of citizens have a right to freely use the public streets, and as this is the duty of the company it is liable if it does not use due care to prevent injury to the various classes of persons that may lawfully use the streets. This principle finds its most frequent illustration in cases of injuries to children and it is quite well agreed that the same degree of care is not to be expected from children as from persons of mature years.<sup>3</sup>

It is the duty of persons using a road or street occupied by a street railway to use ordinary care and diligence to avoid injur-

<sup>1</sup> *Mentz v. Second Avenue R'y Co.*, 3 Abbott's App. Dec. 274; *Lynam v. Union, etc., R'y Co.*, 114 Mass. 83. Compare *Kelly v. Hendrie*, 26 Mich. 255.

<sup>2</sup> *Philadelphia Traction Co. v. Bernheimer (Pa.)*, 17 Atl. R. 477. It was held in the case cited that the statement of the plaintiff that: "I think the gripman could have stopped the car," was a mere expression of opinion. The court cited upon this point, *Fischer v. Ferry Co.*, 16 Atl. R. 635.

<sup>3</sup> *Mallard v. Ninth Avenue R'y Co.*, 7 N. Y. Supp. 666; *Silberstein v. Houston, etc., R'y Co.*, 4 N. Y. Supp. 843; *Etherington v. Prospect Park, etc., Co. (N. Y.)*, 4 Am. & Eng. R'y Cases, 617; *Moore v. Metropolitan, etc., R'y Co.*, 2

*Mackey (Dist. of Col.)*, 437; *Farris v. Cass Avenue R'y Co.*, 8 Mo. App. 588; *Collins v. South Boston, etc., Co.*, 26 Am. & Eng. R'y Cases, 371; *Dahl v. Milwaukee, etc., Co. (Wis.)*, 19 Am. & Eng. R'y Cases, 121; *Maschek v. St. Louis R'y Co.*, 71 Mo. 276; *Hestonville R'y Co. v. Connell*, 88 Pa. St. 520; *Smith v. Hestonville Passenger R'y Co.*, 92 Pa. St. 450; *Winters v. Kansas Cable R'y Co. (Mo.)*, 12 S. W. R. 652. See, upon the general subject, *Rock v. Indian Orchard Mills*, 142 Mass. 522; *Jones v. Old Dominion Cotton Mills*, 82 Va. 140, S. C. 3 Am. St. R. 92; *Fisk v. Central Pacific R'y Co.*, 72 Cal. 38, S. C. 1 Am. St. R. 22; *Brazil Block Coal Co. v. Young*, 117 Ind. 520.

ing the cars or other property of the company. One who carelessly drives against a car moving upon the track of a street railway is liable for all damages which proximately result from his wrongful act.<sup>1</sup>

It is, clearly enough, no more than just that a street railway company which secures a right to use a public road or street should maintain it in as good repair, at least, as it was at the time possession was taken by the company, except in cases where it is otherwise provided by the ordinance or resolution which grants the franchise.<sup>2</sup> It is, indeed, not easy to find any solid ground upon which it can be held that the street or road can be subjected to a use, which, as matter of common knowledge, every one knows greatly increases the wear and tear, and, consequently, the expense of maintaining the way, and yet individual property owners be compelled to bear the increased burden. The benefit which accrues from the use is enjoyed by the company and not the property owners, and it seems, upon the salutary equitable doctrine that "He who derives the advantage ought to sustain the burden," the company should bear the burden of keeping the way in as good condition, at least, as it was when it entered upon the enjoyment of its franchise. The company is unquestionably bound to use ordinary care and diligence to keep the space it occupies in a reasonably safe condition for ordinary travel in so far as its own use and acts are concerned, and there is reason for extending the doctrine, for the company secures a special privilege in a highway, and in consideration of the grant of such a privilege it ought to be held bound to keep the space it occupies in a reasonably convenient condition for travel. The principle upon which we base our conclusion is one that has been long established and often enforced, for it is the principle which is asserted in cases of the crossing or occupancy of highways by ordinary steam railroads.<sup>3</sup>

<sup>1</sup>Chicago West Division R'y Co. v. Rend, 6 Bradwell (Ill. App.), 243.

<sup>2</sup>Memphis Prospect Park and Belt R'y v. State, 87 Tenn. 746, S. C. 11 S. W. R. 946.

<sup>3</sup>Louisville, etc., Co. v. The State, 3 Head. (Tenn.) 524; People v. Chicago, etc., Co., 67 Ill. 118; Eyler v. Allegheny County, 49 Md. 257.

It is competent for the municipal officers to make it the duty of the street railway company licensed to occupy the public streets to maintain the streets in good repair by inserting a provision to that effect in the ordinance or resolution conferring the franchise. Where there is a provision in the ordinance or resolution imposing the duty of repairing upon the company, the duty is held to be a continuing one, and it is not discharged by a simple restoration of the streets to the condition they were in at the time possession was taken.<sup>1</sup> This doctrine is clearly right. We are strongly inclined to the opinion that the duty exists as a continuous one although there may be no express provision in the grant creating it, since the implication is, where no provision is made to the contrary, that a company which acquires a right to use a highway for its special benefit will keep it in reasonable repair. The case falls within the rule that it is the act done for its own benefit, and to advance its own interests, that makes repairs necessary, and, therefore, it is equitable that it should bear the burden of maintaining the highway in repair.<sup>2</sup>

If the street railway company refuses to repair, mandamus will lie to compel it to perform that duty.<sup>3</sup> It has been held that if the company fails or refuses to perform its duty by making the necessary repairs the municipal authorities may make them and collect the expense from the company.<sup>4</sup>

<sup>1</sup> *Burritt v. City of New Haven*, 42 Conn. 174; *State v. Minneapolis, etc.*, R. W. Co. (Minn.), 39 N. W. R. 153; *State v. St. Paul, etc., Co.*, 35 Minn. 131, S. C. 28 N. W. R. 3. 365; *People v. Dutchess, etc.*, 58 N. Y. 152.

<sup>2</sup> *Queen v. Inhabitants of Isle of Ely*, 15 Q. B. 827; *King v. Inhabitants of Lindsey*, 14 East, 318; *King v. Kerri-son*, 3 Maule & S. 526; *Leopard v. Chesapeake and Ohio Canal*, 1 Gill. 222; *Northern Central R. R. Co. v. Mayor of Baltimore*, 46 Md. 425; *Paducah, etc., Co. v. Com.*, 80 Ky. 147; *People v. Chicago and Alton, etc.*, 67 Ill. 118. *In re Trenton Water Power Co.*, 20 N. J. L. 659. See, also, *Johnston v. Providence, etc., Co.*, 10 R. I. 365; *State v. St. Paul, etc., R. R. Co.*, 35 Minn. 131, S. C. 28 N. W. R. 3; *Halifax v. City R'y Co.*, 1 Russ. Ch. Eq. (Nova Scotia), 319.

<sup>3</sup> *Philadelphia, etc., Co. v. Philadelphia*, 11 Phila. 358; *City of Columbus v. Columbus St. R'y Co.*, 45 Ohio, 98, S. C. 32 Am. & Eng. R. R. Cases, 292; *New Haven v. Fair Haven, etc., Co.*, 38 Conn. 422. The municipal authorities must proceed in the ordinary way, and they have no right to make extravagant or unreasonable repairs. *Mayor v. Second Avenue R. R. Co.*, 102 N. Y. 572. See, generally, *Gulf City, etc.*,

If the railroad company negligently fails to perform its duty, and injury is thereby caused to travelers, the municipal corporation may recover from the company the damages it has been compelled to pay to the injured person. The undertaking of a street railway company to maintain the streets in repair does not relieve the municipal corporation from the general duty imposed upon it by law, but where a street railway company is the primary wrong-doer the municipal corporation may compel the company to reimburse it for all damages and costs that it has been compelled to pay.<sup>1</sup> It has also been held that a street railway company which negligently fails to keep the part occupied by it in repair may be indicted for a nuisance, and it was further held that, upon failure to abate the nuisance, the obstructions created by it might be removed.<sup>2</sup> In a recent case the Supreme Court of Wisconsin held that a railway company might be compelled by mandatory injunction to restore a public street which it had torn up to its former condition of usefulness.<sup>3</sup>

It is competent for the municipal corporation which grants a street railway company the privilege of using its streets to require the company to repave or otherwise improve the streets. It has been held with much reason that where the ordinance under which the company claims provides that it shall keep the streets in perpetual repair it may be compelled to repave or otherwise improve the streets.<sup>4</sup> Where there is a general undertaking to keep the street in repair it seems to us that the duty should be regarded as a continuing one, and that the company must make repairs to correspond with the changed and improved condition of the street. Decisions in analogous cases

Co. v. City of Galveston (Tex.), 32 Am. & Eng. R. R. Cas. 300; State v. Ingram, 5 Ired. 441; Rutland v. Dayton, 60 Ill. 58.

<sup>1</sup>People v. City of Brooklyn, 65 N. Y. 349; Brooklyn v. Brooklyn City R'y Co., 47 N. Y. 475; Brooklyn v. Brooklyn City R'y Co., 57 Barb. 497.

<sup>2</sup>Memphis Prospect Park and Belt R'y v. State, 87 Tenn. 746, S. C. 11 S. W. R. 946.

<sup>3</sup>City of Oshkosh v. Milwaukee, etc., Co., 43 N. W. R. 489. It was held that a county may sue to compel a restoration of a highway in Greenup County v. Maysville, etc., R. R. Co. (Ky.), 11 S. W. R. 774.

<sup>4</sup>Pittsburgh and Birmingham R'y Co. v. Borough of Birmingham, 51 Pa. St. 41; District of Columbia v. Washington and Georgetown R'y Co., 1 Mackey, 361, 379.

give support to this conclusion.<sup>1</sup> If it be true that the company is not bound under the continuing duty to make repairs to correspond with the improved or changed condition of the street, then the practical result would be that it would be entirely released from its duty, since it is quite clear that repairs of any other character would be without value or service to the public. Nor is it unreasonable or unjust to hold that the company accepted its franchise under the implied condition that changes and improvements required by progress and growth would be made, for, certainly, neither the municipality nor the company can be presumed to have intended that no progress should be made nor any changes be required. There is more reason for holding that the company is bound to improve, by repaving or otherwise, the space used by it, than there is for holding that the duty to repair extends no further than to require the company to keep the space in the condition it was at the time it took possession. Our conclusion is that where there is a clearly expressed requirement binding the company to repair, the duty is a continuing one and the repairs must be so made as to correspond to the changed condition of the street wrought by the improvement made under the direction of the municipality. In affirming that it is the general duty of the street railway company to repair by restoring the street to the condition in which it was when possession was taken, or by restoring it to the condition in which it is subsequently placed by the municipal government, we are, as we believe, fully within the authorities. There are, indeed, strongly reasoned cases, which, pressing the doctrine farther, hold that it is the duty of the company to improve as well as to repair.

As much as can be safely affirmed in the present state of the decided cases is that the private corporation is bound to repair but is not bound to improve. It is bound to restore but is not

<sup>1</sup> The principle was asserted by the Supreme Court of Pennsylvania in the case of the Town of Phoenixville v. Phoenixville Iron Co., 45 Pa. St. 137, where it was said: "It is a fair presumption the legislature never intended to give away public rights or to impose burdens upon any local community without compensation. This is a continuing obligation upon the company to keep up the bridge." See, also, *Penna. R. R. Co. v. Duquesne Borough*, 46 Pa. 224; *City of Oconto v. Chicago, etc., R. R. Co.*, 44 Wis. 238.

bound to change. We do not, however, think that the duty to repair is to be so narrowed as to require no more than that the private corporation shall restore the street to the condition in which it was when possession was taken; we think the duty extends much beyond that limit. The duty to repair requires that the street shall be so kept as to correspond with its general condition at the time the repairs are required. To illustrate our meaning: If a street paved with wooden blocks is subsequently paved with stone, it would be the duty of the company when it became necessary to repair after the improvement by paving with stone, to make repairs to correspond with the changed condition of the street. It would not, as we interpret the rule sustained by the weight of authority, be compelled to make the new pavement, but it would be its duty, in making repairs after the new pavement was laid, to make them to correspond to the new pavement. Any other rule would make the duty to repair practically valueless, and not only this, it would tend to check the growth and development of towns and cities without just reason or excuse.

The question whether a street railway company can be required to improve a street where that duty is not imposed upon it by the terms of its grant is one upon which the decisions are in conflict. It is maintained by some of the courts, with much force and plausibility, that the franchise of a street railway company is property and should be assessed for the expense of the improvement.<sup>1</sup> The franchise of the company is unquestionably property, and the improvement benefits that property to a greater extent in most cases than it does the property of abutting lot owners, and, as the foundation of the right to assess private property for the cost of a public improvement is the theory that the benefit is the equivalent of the assessment, there is no little strength in the position that the railway company is liable to assessment. But this doctrine is denied

<sup>1</sup> *Chicago City R'y Co. v. City of Chicago*, 90 Ill. 573; *City of Chicago v. Baer*, 41 Ill. 306; *City of Columbus v. Columbus St. R'y Co. (Ohio)*, 32 Am. & Eng. R. R. Cases, 292. In other cases a somewhat similar doctrine is laid down, but the decisions turn upon the language of the grant. *Fort Wayne, etc., St. R'y Co. v. City of Detroit*, 34 Mich. 78; *Fort Wayne, etc., St. R'y Co. v. City of Detroit*, 39 Mich. 543.



by able courts.<sup>1</sup> The question must be regarded as settled by the decision of the Supreme Court of the United States in the case referred to in the note so far as it affects cases in which the ordinance simply binds the company to repair, for to that extent the question is a Federal one. But the question of construction remains an open one, and that can only be determined from the language of the ordinance or resolution involved in the particular case, for various provisions are made in such municipal enactments to which diverse constructions have been given.<sup>2</sup> We suppose that it is safe to affirm that the assumption should be, where there is nothing evidencing the contrary, that the local authorities did not intend to relieve the private corporation from the duty of repairing, for in the absence of a provision relieving it from that duty the law would imply that it exists.<sup>3</sup> It is not to be forgotten that, in cases where the expense of improving a street must be borne by private property owners, neither the legislature nor the municipal corporation can entirely disregard the rights of such owners, for assessments, as we have often said, can only be sustained upon the ground that the specific property receives a benefit different from the general one which accrues to the public. It is impossible to successfully deny that in many instances the use of a street by a railway company lessens the special benefits which accrue to abutting property, whereas, in almost every instance,

<sup>1</sup> *City of Chicago v. Sheldon*, 9 Wall. 50; *State v. Corrigan Consolidated R'y Co.*, 85 Mo. 263; *City of Baltimore v. Scharf*, 54 Md. 499; *City of Philadelphia v. Empire Passenger R'y Co.*, 7 Phila. 321; *Galveston v. Galveston City R'y Co.*, 46 Tex. 435; *Galveston City R'y Co. v. Nolan*, 53 Tex. 139.

<sup>2</sup> *Pittsburgh, etc., R'y Co. v. City of Pittsburgh*, 80 Pa. St. 72; *Philadelphia and Gray's Ferry Co. v. City of Philadelphia*, 11 Phila. 358; *McMahon v. Second Avenue R'y Co.*, 75 N. Y. 231; *Robbins v. Omnibus R'y Co.*, 32 Cal. 472.

<sup>3</sup> This is in harmony with the general principle that a corporation which uses

a highway for its special benefit must restore it to its former condition and maintain it in reasonable repair. *Roberts v. Chicago R. R. Co.*, 35 Wis. 679; *People v. Chicago and Alton R'y Co.*, 67 Ill. 118; *People v. New York Cent. R. R. Co.*, 74 N. Y. 302; *Little Miami, etc., Co. v. Comm'rs*, 31 Ohio St. 338; *Eyler v. County Comm'rs*, 49 Md. 257; *Gear v. Chicago, etc., R'y.* 43 Ia. 83; *Cooke v. Boston, etc., R. R. Co.*, 133 Mass. 185. The duty is continuous and an action to enforce is not barred by the statute of limitations. *Hatch v. Syracuse, etc., Co.*, 50 Hun. 64, S. C. 4 N. Y. Supp. 509; *Little Miami, etc., Co. v. Comm'rs*, *supra*.

the street railway company profits from the improved condition of the street. But it is probably true that, under the rule as now declared by the majority of the cases, as much as can be safely said is, that the railway company is under a general and continuous duty to repair, but is not bound to improve. This conclusion, it is, perhaps, hardly necessary to add, is relevant and valid only in cases where the form of the contract is such as to exonerate the company from the general duty, for, as we have repeatedly said, the contract is controlling, and by it the rights and duties of the parties are to be measured and determined.

## CHAPTER XXX.

### RAILROAD CROSSINGS.

Although the charters of railway corporations are contracts within the meaning of the constitutional prohibition against laws impairing the obligation of contracts, yet such corporations are largely under the control of the legislature in the exercise of its police powers. It may regulate the use of highways by a railroad company by requiring the crossings to be made in a particular manner,<sup>1</sup> and may even impose upon the company the duty of adapting the track and grade to new highways, so as to make the crossings safe and convenient.<sup>2</sup> If a railway

<sup>1</sup> *Veazie v. Mayo*, 45 Me. 560; *Pittsburg, etc., R. R. Co. v. Southwest, etc., Co.*, 77 Pa. St. 173; *People v. Boston, etc., R. R. Co.*, 70 N. Y. 569; *Town of Roxbury v. Cent. Vt. R. R. Co. (Vt.)*, 14 Atl. R. 92. The word "crossing," in a statute includes approaches outside the line of the railroad where they are necessary to make it safe. *Town of Roxbury v. Cent. Vt. R. R. Co. (Vt.)*, 14 Atl. Rep. 92; *Farley v. Railroad Co.*, 42 Ia. 234; *Beatty v. Cent., etc., R. R. Co.*, 58 Ia. 242; *Maltby v. Chicago, etc., R. R. Co.*, 52 Mich. 108. A statute requiring railroad companies to build and maintain highway crossings is not unconstitutional notwithstanding it may be retrospective and apply to companies chartered before its enactment. *Portland, etc., R. C. Co. v. Deering*, 78 Me. 67, S. C. 57 Am. Rep. 784; *Illinois Cent. R. R. Co. v. Willenborg*, 117 Ill. 203, S. C. 57 Am. Rep. 862; *Penna. R. R. Co. v. Riblet*, 66 Pa. St. 164, S. C. 5 Am. Rep. 360. Compare *Detroit v. Plank Road Co.*, 43 Mich. 140. We

believe the doctrine asserted in the cases first cited is the correct one, for any other one would so cripple the legislature as to make it powerless to take measures for the security of the community. It is well known that the doctrine of the *Darmouth College* case has been denied by able jurists, and to so extend it as to seriously impair the police power would be subversive of just principle.

<sup>2</sup> *Roxbury v. Boston, etc., R. R. Co.*, 6 Cush. 424; *State v. Minneapolis, etc., Co.*, 39 Minn. 219, S. C. 39 N. W. 143; *Albany, etc., R. R. Co. v. Brownell*, 24 N. Y. 345; *Westbrook v. New York, etc., R. R. Co.*, 57 Conn. 95, S. C. 16 Atl. R. 724; *English v. New Haven, etc., Co.*, 32 Conn. 240; *Louisville, etc., R. R. Co. v. Smith*, 91 Ind. 119; *Chesapeake, etc., Co. v. Dyer County*, 87 Tenn. 712, S. C. 14 Atl. R. 922. Compare *Northern Cent. R. R. Co. v. Baltimore*, 46 Md. 425, as to the rule where there is no express statutory provision upon the subject. See, also, *Illinois*

company fails to construct its crossings in such a manner as to comply with the requirements of the statute giving it the power to make such crossings, it will be liable for maintaining a nuisance.<sup>1</sup> But where the corporation is given power to construct its crossings in such a manner as may be essential to the convenient transaction of its business, it may, it has been held, change the grade or surface of the highway, if necessary, provided the crossing be kept in good repair and convenient for travelers.<sup>2</sup> But this rule can not, as we believe, be so extended as to authorize a railroad corporation to so construct grades as to endanger the lives of citizens. The right to cross a highway does not authorize an appropriation of any part of it, nor a material interference with the public travel;<sup>3</sup> and the duty

Cent. R. R. Co. v. City of Bloomington, 76 Ill. 447, where it is held that a railroad company can not be compelled by city ordinance to make crossings over new streets. But it seems to us that the latter cases unwarrantably restrict the police power. Georgia, etc., Co. v. Smith, 128 U. S. 174.

<sup>1</sup> Commonwealth v. Nashua, etc. R. R. Co., 2 Gray, 54, Com. v. Erie, etc., R. R. Co., 27 Pa. St. 339; People v. New York Cent. R. R. Co., 74 N. Y. 302; Wasmer v. Delaware, etc., R. R. Co., 80 N. Y. 212; Evansville and Terre Haute R. R. Co. v. Christ, 116 Ind. 446. And see Davis v. City of New York, 14 N. Y. 525; Regina v. Wilson, 18 Q. B. 348; Wellcome v. Leeds, 51 Me. 313. The construction of a bridge of less width than the highway is not *per se* a nuisance, but whether it is a nuisance depends on the particular circumstances of the case. People v. New York, etc., R. R. Co., 89 N. Y. 266.

<sup>2</sup> Commonwealth v. Hartford, etc., R. R. Co., 14 Gray, 379; Davis v. Chicago, etc., R. R. Co., 46 Ia. 389, S. C. 16 Am. Ry. Rep. 45. See, also, Palatka, etc., R. R. Co. v. State, 23 Fla. 546, S. C. 11 Am. St. Rep. 395.

<sup>3</sup> Little Miami, etc., R. R. Co. v. Greene Co., 31 Ohio St. 338; Palatka, etc., R'y Co. v. State, 23 Fla. 546. If a bridge or substituted road be necessary in order to prevent an obstruction of the highway, the company must build it within a reasonable time, and can not delay so doing until its road is completed. Louisville, etc., Co. v. State, 3 Head. (Tenn.) 523, S. C. 75 Am. Dec. 778. In the case of the Palatka, etc., R. R. Co. v. State, 23 Fla. 546, S. C. 11 Am. St. Rep. 395, the question of the rights of a railroad company to cross or use a highway is carefully considered, and the following propositions are stated by the court: 1. A grant to a railroad company of the right to construct its road along, upon or across an existing highway, in the absence of express words to the contrary, is not to be construed as giving it power to destroy the highway. 2. The company must cause as little injury as possible to the highway, and must leave it in a safe and convenient condition for use by the public. The general rule is, that a railway company which crosses a highway must use ordinary care and skill to so construct and maintain the crossing that it shall not be rendered

to restore the highway, and to erect and maintain the necessary structures required to make it reasonably safe and convenient, is a continuing duty,<sup>1</sup> incumbent upon the company, without any express statutory requirement.<sup>2</sup>

A novel application of the principles above stated was made in a recent case of much importance by the Supreme Court of Minnesota. A railroad charter empowered the company to lay its track across any public highway or street, if necessary, on condition that it should put such highway or street "in such condition or state of repair as not to impair or interfere with its free and proper use." It was held that this was a continuing duty, and that, although the crossing might have been adequate when constructed, yet, if by reason of the increase of the business of the railroad, or of the travel upon the street, the crossing became dangerous or obstructed such travel, the railway company was bound to provide some other mode of crossing; and as it appeared that the only safe and convenient mode was to carry the street by a viaduct under the tracks, it was further held that mandamus would lie to compel the railway company to construct such viaduct, including the abutments and approaches as well as the bridge for its tracks.<sup>3</sup> The opinion con-

less safe and convenient for public use, except so far as danger is inseparably incident to the operation of the railroad in the usual mode. *Kyne v. Wilmington, etc., Co.* (Del.), 14 Atl. R. 922; *Caldwell, etc., Co. v. Vicksburgh (La.)*, 6 S. R. 217. It has been held that a county may maintain an action to compel a railroad company to restore the highway. *Greenup Co. v. Maysville, etc., Co.* (Ky.), 11 S. W. R. 774.

<sup>1</sup> *Wellcome v. Leeds*, 51 Me. 313; *Chicago, etc., R. R. Co. v. Moffitt*, 75 Ill. 524; *Hatch v. Syracuse, etc., Co.*, 50 Hun. 64; *Eyler v. Co. Comm'rs*, 49 Md. 257; *Town of Roxbury v. Cent. Vt. R. R. Co.* (Vt.), 14 Atl. R. 92; *People v. N. Y. Cent. R. R. Co.*, 74 N. Y. 302.

<sup>2</sup> *Northern Cent. R. R. Co. v. Baltimore*, 46 Md. 425; *Chesapeake, etc., R.*

*R. Co. v. Dyer Co.*, 38 Am. & Eng. R. R. Cas. 676, and note; *Indianapolis, etc., R. R. Co. v. State*, 37 Ind. 489, 502; *Palatka, etc., R. R. Co. v. State*, 23 Fla. 546. The duty to repair includes the repairing of embankments which are a necessary part of the crossing. *Farley v. Railroad Co.*, 42 Ia. 234. The company is not relieved from this duty merely because a street railroad company is also bound to repair the crossing. *Masterson v. N. Y., etc., R. R. Co.*, 84 N. Y. 247.

<sup>3</sup> *State v. St. Paul, etc., R'y Co.*, 35 Minn. 131, S. C. 59 Am. Rep. 313. See, also, *People v. Dutchess, etc., R. R. Co.*, 58 N. Y. 152; *Indianapolis, etc., R. R. Co. v. State*, 37 Ind. 489; *King v. Kerrison*, 3 Maule & S. 526; *Johnston v. Providence, etc., R. R. Co.*, 10 R. I. 365. Compare *State v. New*

tains a careful and elaborate consideration of the authorities, and seems to us to be well founded in principle. *Qui sentit commodum sentire debet et onus.*

In another case it was held that a railroad company, having the right to disturb the use and enjoyment of a highway only so long as the same might be necessary to complete the crossing, was liable for injuries sustained by a traveler after the track was laid and before the crossing was repaired, where the repairs could, with the exercise of reasonable diligence, have been finished before the time of the accident.<sup>1</sup> The obligation to maintain the crossing generally begins as soon as the railroad is located over it.<sup>2</sup> This duty usually extends only to lawful highways,<sup>3</sup> but if the company has made a crossing public by its own invitation or license it is generally required to keep it in repair.<sup>4</sup> Whether it has so constructed the crossing as to make it reasonably safe and convenient is ordinarily a matter for the jury to determine.<sup>5</sup>

Railway companies must so construct and maintain their premises which abut upon highways and their tracks which run along or across highways that they shall not cause injury to travelers who are lawfully and properly using such highways, and if a company is negligent in this respect it will be liable to a traveler who, while exercising due care on his part, is injured by such negligence.<sup>6</sup> Thus, where a traveler, while walking

Haven, etc., Co., 45 Conn. 331, 348. See *City of Oshkosh v. Milwaukee, etc., Co.*, 43 N. W. R. 489. The rule announced in the Minnesota case, that the railroad company must maintain its crossings so as to meet and provide for the necessities of an increased population or traffic seems to be well supported by other authorities, notably the following: *Cooke v. Boston, etc., R. R. Co.*, 133 Mass. 185, S. C. 10 Am. & Eng. R. R. Cas. 328; *Manley v. St. Helens, etc., R. R. Co.*, 2 Hurl. & N. 840; *English v. New Haven, etc., R. R. Co.*, 32 Conn. 241.

<sup>1</sup> *Dallas, etc., R. R. Co. v. Able* (Tex.), 9 S. W. Rep. 871.

<sup>2</sup> *Pittsburgh, etc., R. R. Co. v. Com.*, 101 Pa. St. 192; *Buchner v. Chicago, etc., R. R. Co.*, 60 Wis. 264.

<sup>3</sup> *International, etc., R. R. Co. v. Jordan* (Tex.), 10 Am. & Eng. R. R. Cas. 301; *Mo., etc., R. R. Co. v. Long*, 27 Kan. 684; *Flint, etc., R. R. Co. v. Willey*, 47 Mich. 88.

<sup>4</sup> *Kelly v. Southern, etc., R. R. Co.*, 28 Minn. 98.

<sup>5</sup> *Roberts v. Chicago, etc., R. R. Co.*, 35 Wis. 679.

<sup>6</sup> *Beatty v. Cent. Ia. R'y Co.*, 58 Ia. 242; *Sweeny v. Old Colony R. R. Co.*, 10 Allen, 368, S. C. 87 Am. Dec. 644; *Titcomb v. Fitchburg R. R. Co.*, 12 Allen, 254; *Conlon v. Eastern R. R.*

upon a highway under a bridge upon which the railroad crossed the highway, was injured by a brick falling from one of the abutments, the company was held liable.<sup>1</sup> So, where a canal company, required by charter to keep its bridges in repair, negligently allowed a bridge to remain in such condition that it fell and injured a traveler upon the highway while crossing the bridge, the company was held liable.<sup>2</sup> There are also many cases in which railway companies have been held liable for injuries caused by defects in their crossings, such as holes,<sup>3</sup> defects in the planking between the tracks,<sup>4</sup> and the like.<sup>5</sup> So, where a railroad was constructed upon a highway within the limits of a municipality whose ordinances required the track to be kept clear of snow, the company was held liable for injuries caused by its failure to remove the snow within a reasonable

Co., 135 Mass. 195; *Goldthorpe v. Hardman*, 13 Mees. & W. 377; *Robbins v. Jones*, 15 Com. B. (N. S.) 221.

<sup>1</sup> *Kearney v. London, etc., R'y Co.*, L. R. 5 Q. B. 411. See, also, *Cooke v. Boston, etc., R. R. Co.*, 133 Mass. 185.

<sup>2</sup> *Penna., etc., Canal Co. v. Graham*, 63 Pa. St. 290. See, also, *Manley v. St. Helens Canal & R'y Co.*, 2 Hurl. & N. 840; *Dickie v. Boston, etc., R. R. Co.*, 131 Mass. 516.

<sup>3</sup> *Oakland R'y Co. v. Fielding*, 48 Pa. St. 320, *Washburn v. Chicago, etc., R'y Co. (Wis.)*, 32 N. W. Rep. 234.

<sup>4</sup> *Wasmer v. Delaware, etc., R. R. Co.*, 80 N. Y. 212; *Payne v. Troy, etc., R. R. Co.*, 83 N. Y. 572, S. C. 6 Am. & Eng. R'y Cas. 54; *Penna. R. R. Co. v. Boylan*, 104 Ill. 595; *Tetherow v. St. Joseph, etc., R. R. Co. (Mo.)*, 11 S. W. Rep. 310; *Pittsburgh, etc., R'y Co. v. Dunn*, 56 Pa. St. 289; *O'Conner v. Boston, etc., R'y Co.*, 135 Mass. 352.

<sup>5</sup> *Oliver v. North E. R'y Co.*, L. R. 9 Q. B. 409; *Johnson v. St. Paul, etc., R. R. Co.*, 31 Minn. 283; *Paine v. Grand Trunk R. R. Co.*, 58 N. H. 611; *Indianapolis, etc., R. R. Co. v. Stout*, 53 Ind. 143; *Louisville, etc., R'y Co. v. Smith*, 91 Ind. 119, S. C. 13 Am. &

Eng. R'y Cas. 608, and note. In the case of *Wasmer v. Delaware, etc., R. R. Co.*, 80 N. Y. 212, it was held that the railroad Company was liable to a traveler injured at a crossing, where, instead of properly restoring the highway to its former condition, the company left its rails projecting four and a half inches above the surface of the street without any planking or filling in between them. So, in the case of *Payne v. Troy, etc., R. R. Co.*, 83 N. Y. 572, the company was held liable where it appeared that there were over three and a quarter inches between the planking and the rail, while two and a quarter inches only were required, and plaintiff's horse got her hoof into the space so that the toe of the shoe caught under the rail. A like ruling was made where an infant's foot was caught between the plank and the rail at a similar crossing. *Spooner v. Delaware, etc., R. R. Co.*, 115 N. Y. 22. See, also, *Snow v. Housatonic R. R. Co.*, 8 Allen, 441; *Oakland R. R. Co. v. Fielding*, 48 Pa. St. 320; *Veazie v. Penobscot, R. R. Co.*, 49 Me. 119; *People v. Chicago, etc., R. R. Co.*, 67 Ill. 118, *Cuddeback v. Jewett*, 20 Hun. 187.

time,<sup>1</sup> and where a railway company permitted "engineer stakes" to remain upon a street and a traveler on such street was injured by falling over the stakes, the company was held liable therefor.<sup>2</sup> If a railroad company by its negligent failure to construct and maintain culverts where it is its duty to maintain them causes an injury to persons or property, it will be held responsible for resulting damages,<sup>3</sup> and this principle must apply to cases where its wrongful breach of such a duty renders a highway unsafe and thus causes an injury to the person or property of a traveler lawfully using the public way.

Two very interesting cases, illustrative of the principles we have just been considering, were recently decided by the Supreme Court of Indiana. In the case first decided it appeared that the defendant, a railroad company, had failed to perform the statutory duty of restoring a highway, across which its track had been constructed, to its former safe condition, and had left the track nine inches above the surface of the highway. The company was held liable for the death of the plaintiff's horse caused by extraordinary exertion in pulling a loaded wagon over the obstruction.<sup>4</sup> In the second case the railroad company had also violated its statutory duty to restore the highway to its former safe and convenient condition by leaving excavations and embankments therein. The highway constituted the plaintiff's only means of ingress and egress to and from his home, and, while riding homeward one day, the plaintiff, without fault on his part, by reason of such obstructions, combined with the fright of his horse at a hand car negligently managed by the company's servants, was severely injured. The railroad company was held liable.<sup>5</sup>

Where a railway is located upon or across a public highway,

<sup>1</sup> *Bowen v. Detroit, etc., R'y Co.*, 54 Mich. 496.

<sup>2</sup> *Gudger v. Western, etc., R. R. Co.*, 87 N. Car. 325. So, where a railroad company constructed a culvert at a crossing and left it uncovered, the company was held liable to a pedestrian who fell into the culvert and was injured at a time when it was so filled

with snow that he could not see it. *Judson v. Railroad Co.*, 29 Conn. 434.

<sup>3</sup> *McPherson v. St. Louis, etc., Co.*, 97 Mo. 253, S. C. 10 S. W. R. 846; *Sullens v. Chicago, etc., Co.*, 74 Ia. 659, S. C. 7 Am. St. R. 501.

<sup>4</sup> *Evansville, etc., R. R. Co. v. Carvener*, 113 Ind. 51.

<sup>5</sup> *Evansville, etc., R. R. Co. v. Crist*, 116 Ind. 446.



or where, although not upon a public highway, the track has been used by travelers as a public crossing or highway for a long time with the knowledge of the company and without objection, such company is bound to exercise due care to prevent injury to persons so using its track, and such persons can not be regarded as trespassers.<sup>1</sup> If injuries are sustained, without fault of the injured party, at crossings in a city whose duty it is to keep its streets in repair, by reason of obstructions or defects caused or created by the negligent breach of duty of the railroad company, the injured party is entitled to his action against either the city or the company,<sup>2</sup> but he can not, of course, recover against the city unless it appears that it was also guilty of negligence. If he brings it against the city and succeeds the latter has a remedy over against the company.<sup>3</sup> So, if the company is bound to keep the crossing in repair, and refuses to perform that duty, the officers of the city or town required to see that it is kept safe for travel may repair it and recover the cost thereof from the railway company.<sup>4</sup>

The rights of railroad companies and travelers at highway crossings have been said to be "mutual, co-extensive and, in all respects, reciprocal."<sup>5</sup> This is true only in a limited sense, for the statement should be taken with the qualification that the railroad company has the right of way, and the traveler must

<sup>1</sup> Louisville, etc., R. R. Co. v. Phillips, 112 Ind. 59, S. C. 2 Am. St. Rep. 155; Byrne v. N. Y. R. R. Co., 104 N. Y. 362, S. C. 58 Am. Rep. 512; Missouri Pac. R'y Co. v. Bridges (Tex.), 12 S. W. Rep. 210; Taylor v. Delaware, etc., Co., 113 Pa. St. 162, S. C. 57 Am. Rep. 446; Davis v. Chicago, etc., R. R. Co., 58 Wis. 646; Bellefontaine R. R. Co. v. Snyder, 18 Ohio St. 399, S. C. 98 Am. Dec. 175; Frick v. St. Louis, etc., R'y Co., 75 Mo. 595; Bennett v. Railroad Co., 102 U. S. 577; Baltimore, etc., R. R. Co. v. Breinig, 90 Am. Dec. 49, and note 55. Compare Kelly v. Michigan Cent. R. R. Co., 65 Mich. 186, S. C. 8 Am. St. Rep. 876.

<sup>2</sup> Hamden v. New Haven, etc., Co., 27 Conn. 158; Lee v. Barkhamsted, 46

Conn. 213; People v. Brooklyn, 65 N. Y. 349; Hawks v. Northampton, 116 Mass. 420; Eyler v. Co. Comm'rs, 49 Md. 257. See, also, Wasmer v. Delaware, etc., R. R. Co., 80 N. Y. 212, S. C. 36 Am. Rep. 608; Schmidt v. Chicago, etc., R. R. Co., 83 Ill. 405; note to Baltimore, etc., R. R. Co. v. Breinig, 90 Am. Dec. 56, 59.

<sup>3</sup> City of Portland v. Atlantic, etc., Co., 66 Me. 485, Woburn v. Boston, etc., R. R. Co., 109 Mass. 283, S. C. 6 Am. R'y Rep. 270.

<sup>4</sup> Penna. R'y Co. v. Duquesne Borough, 46 Pa. St. 223; Wellcome v. Leeds, 51 Me. 313; Chesapeake, etc., R. R. Co. v. Dyer Co., 38 Am. & Eng. R. R. Cas. 676.

<sup>5</sup> 1 Rorer on Railroads, 531.

wait until the train, the coming of which he knows or ought to know, has passed.<sup>1</sup> Each party must make all reasonable and proper efforts to foresee and avoid collisions. But when a statute requires some signal or warning, such as the ringing of the bell or the blowing of the whistle, to be given by a train approaching a highway crossing, the omission thereof is such negligence as will render the railroad company liable to one who, without fault on his part, has suffered injury as the result of that negligence.<sup>2</sup> The railroad company is not, however, liable in such a case if the omission to give the statutory signals was not the proximate cause of the injury.<sup>3</sup> Thus, if the traveler, by other means, has timely notice of the approach of the train, the failure to give the statutory signals can not be considered as the proximate cause of his injury, and will not, therefore, be sufficient, of itself, to render the company liable.<sup>4</sup> The traveler approaching a crossing has a right to presume that the statutory signals will be given,<sup>5</sup> but he is not relieved from the duty

<sup>1</sup> *Pierce on Railroads*, 342; *Ohio, etc., R. R. Co. v. Walker*, 113 Ind. 196; *Louisville, etc., R. R. Co. v. Phillips*, 112 Ind. 59; *Indianapolis, etc., R. R. Co. v. McLin*, 82 Ind. 435; *Continental, etc., Co. v. Stead*, 95 U. S. 161; *Adolph v. Cent. Park, etc., R. R. Co.*, 65 N. Y. 554; *Chicago, etc., R. R. Co. v. Lee*, 87 Ill. 454; *Black v. Burlington, etc., R. R. Co.*, 38 Ia. 515; *Baltimore, etc., R. R. Co. v. Sherman*, 30 Gratt. 602; *Nagle v. Allegheny, etc., R. R. Co.*, 88 Pa. St. 35. The company has, of necessity, a superior right, for it can not stop its trains or slacken their speed at every crossing, and of this the traveler on the highway must take notice.

<sup>2</sup> *Western, etc., R. R. Co. v. Young* (Ga.), 37 Am. & Eng. R. R. Cas. 489; *South & N. Ala. R. R. Co. v. Donovan*, 36 Am. & Eng. R. R. Cas. 151, S. C. 84 Ala. 141; *Renwick v. N. Y. Cent. R. R. Co.*, 36 N. Y. 132; *O'Mara v. Hudson River R. R. Co.*, 38 N. Y. 445; *Atlanta, etc., R'y Co. v. Wyley*, 65 Ga. 120; *Western, etc., R'y Co. v. Steadly*,

65 Ga. 263; *Peart v. Grand Trunk R'y Co.*, 10 Ont. App. 191; *Faber v. St. Paul, etc., R'y Co.*, 29 Minn. 465; *Dimick v. Chicago, etc., R'y Co.*, 80 Ill. 338; *Leavenworth, etc., R. R. Co. v. Rice*, 10 Kan. 426; *Eswin v. St. Louis, etc., R. R. Co.*, 96 Mo. 290, S. C. 9 S. W. R. 577; *Nuzum v. R'y Co.*, 30 W. Va. 228.

<sup>3</sup> *Briggs v. N. Y., etc., R. R. Co.*, 72 N. Y. 26; *Toledo, etc., R. R. Co. v. Jones*, 76 Ill. 311; *Parker v. Wilmington, etc., Co.*, 86 N. C. 221; *Harlan v. St. Louis, etc., Co.*, 65 Mo. 22; *Atchison, etc., R. R. Co. v. Morgan*, 13 Am. & Eng. R. R. Cas. 499, and note; *Pierce on Railroads*, 351; *Sellick v. Lake Shore, etc., R. R. Co.*, 23 Am. & Eng. R. R. Cas. 338, and note.

<sup>4</sup> *Pakalinsky v. N. Y. Cent. R. R. Co.*, 82 N. Y. 424, S. C. 2 Am. & Eng. R. R. Cas. 251; *Chicago, etc., R. R. Co. v. Bell*, 70 Ill. 102; *Houston, etc., R. R. Co. v. Nixon*, 52 Tex. 19.

<sup>5</sup> *Ernst v. Hudson River R. R. Co.*, 35 N. Y. 9, S. C. 90 Am. Dec. 761, and

of looking up and down the track or taking other reasonable precautions under the circumstances merely because the company has omitted to give such signals.<sup>1</sup> The mere fact that the company has observed the statutory requirements is not sufficient to relieve it from liability if it fails to observe other reasonable precautions;<sup>2</sup> but it is error, in an action against a railroad company for negligence at a city crossing, after the failure to sound the whistle has been shown by the plaintiff, to refuse to admit in evidence for the defense a city ordinance prohibiting the sounding of whistles and ringing of bells upon engines within the city limits.<sup>3</sup> It is to be observed, however, that in a populous city where signals can not be given it is the duty of the company to run its trains at such a rate of speed as not to put in jeopardy the safety of persons having a right to use the highways. It is obvious that where the streets of a large city are much used the high rate of speed allowable in rural districts will not be permissible, even in the absence of express State or municipal regulations.

Although there may be no statute requiring signals or warning of the approach of a train to be given, yet, if ordinary care and reasonable prudence require them, the failure to give them will be negligence.<sup>4</sup> Whether there is or is not a statute, it is

note; *Pittsburgh, etc., R. R. Co. v. Martin*, 82 Ind. 476, 483; *Virginia, etc., R. R. Co. v. White*, 84 Va. 498, S. C. 10 Am. St. Rep 874; *Kennayde v. Pac. R. R. Co.*, 45 Mo. 255; *Wabash, etc., R. R. Co. v. Cent. Trust Co.*, 23 Fed. R. 738; *Philadelphia, etc., R. R. Co. v. Hagan*, 47 Pa. St. 244, S. C. 86 Am. Dec. 541; *Klanowski v. Grand Trunk R'y Co.*, 24 N. W. R. 802; *Schmidt v. Burlington, etc., R'y Co.*, 39 N. W. R. 916.

<sup>1</sup> *Ormsbee v. Boston, etc., R. R. Co.*, 14 R. I. 102, S. C. 51 Am. R. 354; *Gorton v. Erie, etc., R. R. Co.*, 45 N. Y. 660; *Chicago, etc., R. R. Co. v. Houston*, 95 U. S. 697; *Schofield v. Chicago, etc., R. R. Co.*, 114 U. S. 618; *Fletcher v. Atlantic, etc., R. R. Co.*, 64 Mo. 484; *Cincinnati, etc., R. R. Co. v.*

*Butler*, 103 Ind. 31. Where, however, obstacles prevent him from seeing an approaching train, and no signals are given, he can not, from that fact alone, be invariably deemed guilty of contributory negligence.

<sup>2</sup> *Linfield v. Old Colony R. R. Co.*, 10 Cush. 562, S. C. 57 Am. Dec. 124; *Eaton v. Fitchburg R. R. Co.*, 129 Mass. 365; *Webb v. Portland, etc., R. R. Co.*, 57 Me. 134; *South & N. Ala. R. R. Co. v. Thompson*, 62 Ala. 494; *Dyer v. Erie R. R. Co.*, 71 N. Y. 228. Compare *Chicago, etc., R. R. Co. v. Robinson*, 106 Ill. 142.

<sup>3</sup> *Penna. Co. v. Hensil*, 70 Ind. 569.

<sup>4</sup> *Paducah, etc., R. R. Co. v. Hoehl*, 12 Bush. (Ky.) 41, S. C. 18 Am. Ry. Rep. 338; *Craig v. N. Y., etc., R. R. Co.*, 118 Mass. 431; *McGrath v. N. Y.*

the duty of a railroad company to use reasonable and ordinary care to prevent injury to travelers who themselves exercise ordinary care. It is generally for the jury to determine, in such cases, what notice is reasonable under the circumstances,<sup>1</sup> but it may sometimes be a question of law for the court.<sup>2</sup>

Where a railroad crosses a highway in a city or town, and the crossing is not protected by a gate or watchman, it is generally the duty of the company to so moderate the speed of its trains that the sound of the whistle or bell can be heard by travelers upon the street in time to give them effectual warning;<sup>3</sup> but aside from legislative or municipal requirement a high rate of speed is not, as a rule at least, negligence *per se*;<sup>4</sup> and a high rate of speed may be perfectly proper at country crossings although it might be negligence in a populous city.<sup>5</sup> A railroad company is, however, liable for injuries caused by running its trains at a rate of speed prohibited by statute,<sup>6</sup> and it may be negligent even in permitting its trains to approach a dangerous crossing at a rate of speed as great as that allowed by statute.<sup>7</sup> It is obvious that there may be cases—extreme ones, perhaps—

Cent. R. R. Co., 63 N. Y. 522; Loucks v. Chicago, etc., Ry. Co., 31 Minn. 526; Winstanley v. Chicago, etc., Ry. Co. (Wis.), 39 N. W. Rep. 856; Chicago, etc., R. R. Co. v. Still, 19 Ill. 499, S. C. 71 Am. Dec. 236. Habitual neglect to give signals is an indictable nuisance. Louisville, etc., Co. v. Com., 13 Bush. (Ky.) 388, S. C. 26 Am. Rep. 205.

<sup>1</sup>Shaber v. St. Paul, etc., R. R. Co., 28 Minn. 103; Cordell v. N. Y. Cent. R. R. Co., 64 N. Y. 535; Linfield v. Old Colony R. R., 10 Cush. 562, S. C. 57 Am. Dec. 124.

<sup>2</sup>Loucks v. Chicago, etc., R. R. Co., 31 Minn. 526.

<sup>3</sup>Continental, etc., Co. v. Stead. 95 U. S. 161; Louisville, etc., R. R. Co. v. Com., 14 Am. & Eng. R. R. Cas. 613.

<sup>4</sup>Reading, etc., R. R. Co. v. Ritchie, 102 Pa. St. 425; Terre Haute, etc., R. R. Co. v. Clark, 73 Ind. 168; Warner v. New York Cent. R. R. Co., 44 N. Y.

(5 Hand.) 465; Dyson v. N. Y., etc., R. R. Co. (Conn.), 17 Atl. Rep. 137. But a high rate of speed may be deemed negligence during busy hours in a populous city where the streets are thronged with people. Here, as elsewhere, the rule is that the care must be proportioned to the known and probable danger.

<sup>5</sup>Felfer v. Northern R. R. Co., 1 Vroom (N. J.), 188.

<sup>6</sup>Haas v. Chicago, etc., R. R. Co., 41 Wis. 44; Correll v. Burlington, etc., R. R. Co., 38 Ia. 120; St. Louis, etc., R. R. Co. v. Mathias, 50 Ind. 65; Chicago, etc., R. R. Co. v. Becker, 84 Ill. 483; Schmidt v. Burlington, etc., Ry. Co. (Ia.), 39 N. W. Rep. 916.

<sup>7</sup>Louisville, etc., Ry. Co. v. Milam, 9 Lea. (Tenn.) 223; Shaber v. St. Paul, etc., Ry. Co., 28 Minn. 103; Patterson's Ry. Accident Law, section 157.

where it is not enough to simply obey a statute or an ordinance, but the general rule is that obedience to the statute or municipal law is all that is required.

The track itself is a warning of danger,<sup>1</sup> and, in the absence of a statutory requirement, railroad companies are not generally bound to place flagmen, signs, or gates at their crossings,<sup>2</sup> but where a crossing is exceptionally dangerous, ordinary and reasonable care and prudence may require that some such action shall be taken by the company.<sup>3</sup> If a railroad company does post a flagman at the crossing, his negligent failure to perform the duties of his post will be considered as negligence on the part of the company;<sup>4</sup> and his withdrawal by the company without notice to the public is evidence of negligence on the part of the company.<sup>5</sup> So, where a railroad company, in pursuance of a city ordinance, has erected gates and stationed a watchman at a street crossing, the absence of the watchman from his post and the failure to lower the gates while a train is approaching, in violation of such ordinance, makes the company a wrong-doer; and the traveler, who finds the gate open and receives no warning from the flagman, has a right to assume that there are no approaching trains.<sup>6</sup> If, acting upon

<sup>1</sup> *McGrath v. N. Y. Cent. R. R. Co.*, 59 N. Y. 468, 473; *Pierce on Railroads*, 353; *Stubley v. London, etc., R. R. Co.*, L. R. 1 Ex. 13; *Mynning v. Detroit, etc., R. R. Co.*, 64 Mich. 93, S. C. 8 Am. St. Rep. 804.

<sup>2</sup> *Welsch v. Hannibal, etc., R. R. Co.*, 72 Mo. 451, S. C. 37 Am. Rep. 440; *Beisiegel v. N. Y. Cent. R. R. Co.*, 40 N. Y. 9; *Stubley v. London, etc., Ry. Co.*, L. R. 1 Ex. 13 (gate); *State v. Phila., etc., R. R. Co.*, 47 Md. 76; *Haas v. Grand Rapids, etc., R. R. Co.*, 47 Mich. 401 (signboards); *McGrath v. N. Y. Cent. R. R. Co.*, 17 Am. Rep. 359, and note. But municipal corporations may require gates and flagmen in cases where the public safety demands.

<sup>3</sup> *Penna. R. R. Co. v. Matthews*, 7 Vroom (N. J.), 531; *Kansas Pac. R. R.*

*Co. v. Richardson*, 25 Kan. 391; *Eaton v. Fitchburg, etc., R. R. Co.*, 129 Mass. 364. It has been held negligence on the part of a railroad company not to have some one give notice of the approach of trains at a crossing in a large city. *Cent. Pass. R. R. Co. v. Kuhn*, 86 Ky. 578.

<sup>4</sup> *Kissenger v. N. Y., etc., R. R. Co.*, 56 N. Y. 543; *Dolan v. Dela., etc. R. R. Co.*, 71 N. Y. 285; *Sweeny v. Old Colony R. R. Co.*, 10 Allen, 368; *Peck v. Mich. Cent. R. R. Co. (Mich.)*, 19 Am. & Eng. R. R. Cas. 257.

<sup>5</sup> *Pittsburgh, etc., R. R. Co. v. Yundt*, 78 Ind. 373; *St. Louis, etc., R. R. Co. v. Dunn*, 78 Ill. 197. Compare *McGrath v. N. Y. Cent. R. R. Co.*, 59 N. Y. 468.

<sup>6</sup> *Whelan v. N. Y., etc., R. R. Co.*, 38 Fed. Rep. 15; *Wanless v. N. E. R. W.*

this assumption, he enters upon the crossing and is instantly confronted by trains going in opposite directions, so that he becomes confused by the unexpected danger and is struck and killed by one of the trains, the railroad company is liable.<sup>1</sup> The familiar rule that one confronted by a sudden danger brought upon him by the negligence of another is not to be expected to act with the coolness and prudence required in other cases applies, and the wrong-doing company is not necessarily exonerated although the injured person may not have acted with prudence and care.<sup>2</sup>

If a railroad company, in the management of its trains, causes unusual peril to travelers, it should meet such peril by corre-

Co. L R 6 Q. B. 481; *Railway Co. v. Schneider*, 45 Ohio St. 678; *Baker v. Pendergast*, 32 Ohio St. 494. But this will not excuse the entire want of care on the part of the traveler. *Greenwood v. Philadelphia, etc., R. R. Co.*, 124 Pa. St. 572, *Cent. Pass R. R. Co. v. Kuhn*, 86 Ky. 578.

<sup>1</sup> *Penna. Co. v. Stegemeier*, 118 Ind. 305; *Hooper v. Boston, etc., R. R. Co. (Me.)*, 17 Atl. Rep. 64. See, also, *Central Trust Co. v. Wabash, etc., R. R. Co.*, 27 Fed. Rep. 159; *Greany v. Long Island R. R. Co.*, 101 N. Y. 419; *Chicago, etc., R. R. Co. v. Hutchinson*, 120 Ill. 587; 2 *Wood R'y Law*, 1328; 2 *Shearm. & Redf. Neg.*, section 466; *Sharpe v. Glushing*, 96 N. Y. 676; *Stapley v. London, etc., R. R. Co.*, L. R. 1 Ex. 21. Compare *Philadelphia, etc., R. R. Co. v. Boyer*, 97 Pa. St. 91; *Peck v. N. Y., etc., R. R. Co.*, 50 Conn. 379.

<sup>2</sup> *Barton v. Springfield*, 110 Mass. 131; *Weare v. Fitchburg*, 110 Mass. 334; *Voak v. Northern Central Co.*, 75 N. Y. 320; *Karr v. Parks*, 40 Cal. 188; *Stokes v. Saltonstall*, 13 Peters, 101; *Southwestern, etc., Co. v. Paulk*, 24 Ga. 356; *Gumz v. Chicago, etc. Co.*, 52 Wis. 672. A plaintiff may, indeed, recover where he goes into danger caused by the negligence of another, although

his fright or confusion may not have been caused by the party whose negligence was the proximate cause of his injury. This doctrine is forcibly illustrated by the case of *Moore v. The Central, etc., Co.*, 47 Ia. 688, in which it was held that one endeavoring to escape from a runaway team of horses could not be denied a recovery upon the ground of contributory negligence. The doctrine is one of wide sweep, and has been applied in a great variety of cases. *Coulter v. American Express Co.*, 56 N. Y. 585; *Dublin, etc., Co. v. Slattery*, L. R. 3 App. Cases, 1155; *Collins v. Davidson*, 19 Fed. R. 83; *Knapp v. Sioux City, etc., Co.*, 65 Ia. 91; *Wesley Coal Co. v. Healer*, 84 Ill. 126; *Mark v. St. Paul, etc., Co.*, 30 Minn. 493; *Iron R'y Co. v. Mowery*, 36 Ohio St. 418; *Stickney v. Maidstone*, 30 Vt. 738. The principle is essentially the same as that which exonerates a person from the charge of contributory negligence where he exposes himself to danger to save life. *Eckert v. Long Island, etc., Co.*, 43 N. Y. 502; *Linnehan v. Sampson*, 126 Mass. 506; *Cotterill v. Chicago, etc., Co.*, 47 Wis. 634; S. C. 32 Am. R. 796; *Penna. Co. v. Roney*, 89 Ind. 453; S. C. 46 Am. R. 173.

sponding precautions.<sup>1</sup> So, where the crossing is especially dangerous to travelers on account of its locality or mode of construction, or because the track is curved or the view obstructed, it is the duty of the company to exercise such care and take such precautions as the dangerous nature of the crossing requires.<sup>2</sup> City crossings are usually more dangerous than those in the country, and greater precautions should, therefore, generally be taken in the city than in the open country.<sup>3</sup>

It is the duty of a railway company to use ordinary and reasonable care to avail itself of approved and well known improvements, which materially contribute to safety, to adequately equip its engines and trains with breaks and appliances necessary to properly control and arrest their progress,<sup>4</sup> and to have a sufficient number of competent employes to properly control and operate its trains.<sup>5</sup> This duty is most often enforced in favor of passengers, but it extends also to persons rightfully using or crossing the tracks.<sup>6</sup>

<sup>1</sup> *Klein v. Jewett*, 26 N. J. Eq. 474, 479; *N. Y., etc., R. R. Co. v. Randel*, 47 N. J. L. 144, S. C. 23 Am. & Eng. R. R. Cas. 308; *Brown v. Hannibal, etc., R. R. Co.*, 50 Mo. 461; *Mackay v. N. Y. Cent. R. R. Co.*, 35 N. Y. 75.

<sup>2</sup> *Dimick v. Chicago, etc., R'y Co.*, 80 Ill. 338; *Funston v. Chicago, etc., R'y Co.*, 61 Ia. 452; *Central R. R. Co. v. Feller*, 84 Pa. St. 226; *Nehrbas v. Cent. Pac. R. R. Co.*, 62 Cal. 320; *Cordell v. N. Y., etc., R. R. Co.*, 75 N. Y. 330; *Roberts v. Chicago, etc., R. R. Co.*, 35 Wis. 679; *Continental, etc., Co. v. Stead*, 95 U. S. 161; *Richardson v. N. Y. Cent. R. R. Co.*, 45 N. Y. 846. See, also, *Penna. Co. v. Stegemier*, 118 Ind. 306. Thus where the railroad company allows weeds to grow up on its right of way, brush or wood to be piled up thereon, or unnecessarily leaves its cars standing in the street so as to obstruct the view of the crossing, it will be guilty of negligence unless it takes such additional care to give warning and prevent injury as the circumstances re-

quire. *Indianapolis, etc., R. R. Co. v. Smith*, 78 Ill. 112; *Rockford, etc., R. R. Co. v. Hillmer*, 72 Ill. 235; *Chicago, etc., R. R. Co. v. Lee*, 87 Ill. 454; *Mackay v. N. Y. Cent. R. R. Co.*, 35 N. Y. 75; *McGuire v. Railroad Co.*, 2 Daly, 76.

<sup>3</sup> *Fero v. Buffalo, etc., R. R. Co.*, 22 N. Y. 209, S. C. 78 Am. Dec. 178, and note 185; *Beiseigel v. N. Y. Cent. R. R. Co.*, 34 N. Y. 622; *Longabaugh v. Virginia City R. R. Co.*, 9 Nev. 295; *Telfer v. Northern R. R. Co.*, 1 Vroom (N. J.), 188; *Gagg v. Vetter*, 41 Ind. 228.

<sup>4</sup> *Smith v. N. Y., etc., R. R. Co.*, 19 N. Y. 127; *Costello v. Syracuse, etc., R. R. Co.*, 65 Barb. 92.

<sup>5</sup> *O'Mara v. Hudson River R. R. Co.*, 38 N. Y. 445; *St. Louis, etc., R. R. Co. v. Mathias*, 50 Ind. 65; *Toledo, etc., R. R. Co. v. Maginnis*, 71 Ill. 346; *Kansas Pacific R. R. Co. v. Pointer*, 14 Kan. 37.

<sup>6</sup> It is understood, of course, that the duty of a railroad company as a carrier of passengers is much higher than the

The question of negligence is generally a question of fact, or a mixed question of law and fact, to be determined by the jury, under proper instructions; but there are many acts which require unusual precautions upon the part of railroad companies, for the doing of which, without such precautions, they have been held negligent in law. Thus, making a "flying switch" over a crossing without giving notice or taking other special precautions to protect travelers is negligence as matter of law.<sup>1</sup> So, it is culpable negligence to push a train backward by a locomotive in a reversed position, without warning and in the absence of a lookout,<sup>2</sup> to send a train around a curve on a down grade and over a crossing without a brakeman,<sup>3</sup> or to send a detached car at night over a crossing in a populous city, without a brakeman or a light.<sup>4</sup> Trains should not pass each other at a dangerous speed on a crossing;<sup>5</sup> and it is negligent for a railroad company to run trains so near together at a crossing as to render the statutory signals unavailing to warn travelers upon the highway.<sup>6</sup>

It is not every accident, however, for which a railroad company will be liable, even where the person injured is exercising due care at the time of the injury. Cases of "pure accident," where there is no fault on either side are extremely rare, but

duty it owes to travelers on a highway which it crosses with its trains. *Terre Haute, etc., Co. v. Clem (Ind.)*, 23 N. E. R. 965. But while this is true it is also true that the company is bound to exercise ordinary care and skill in the operation and management of its trains, and this duty is one owing to all travelers rightfully using the highway with due care.

<sup>1</sup>*French v. Taunton, etc., R. R. Co.*, 116 Mass. 537; *Brown v. N. Y. Cent. R. R. Co.*, 32 N. Y. 597; *Butler v. Milwaukee, etc., R. R. Co.*, 28 Wis. 487; *Illinois, etc., R. R. Co. v. Hammer*, 72 Ill. 347; *Philadelphia, etc., R. R. Co. v. Troutman*, 6 Am. & Eng. R. R. Cases, 117. Compare *Ormsbee v. Boston, etc., R. R. Co.*, 14 R. I. 102, S. C. 51 Am. Rep. 354, and see *Ferguson v. Wiscon-*

*sin, etc., R. R. Co.*, 19 Am. & Eng. R. R. Cas. 285.

<sup>2</sup>*Chicago, etc., R. R. Co. v. Triplett*, 38 Ill. 482; *Kansas Pac. R. R. Co. v. Pointer*, 14 Kan. 37; *Kansas Pacific R. R. Co. v. Ward*, 4 Col. 30; *Eaton v. Erie, etc., R. R. Co.*, 51 N. Y. 544; *Cooper v. Lake Shore, etc., R. R. Co.*, 33 N. W. R. 306, S. C. 66 Mich. 261, S. C. 11 Am. St. Rep. 482.

<sup>3</sup>*Kay v. Penna. R. R. Co.*, 65 Pa. St. 269.

<sup>4</sup>*Chicago, etc., R. R. Co. v. Garvey*, 58 Ill. 83.

<sup>5</sup>*New Jersey R. R. Co. v. West*, 32 N. J. L. 91.

<sup>6</sup>*Chicago, etc., R. R. Co. v. Boggs*, 101 Ind. 522, S. C. 51 Am. Rep. 761. See, also, *Duame v. Chicago, etc., R. R. Co. (Wis.)*, 40 N. W. Rep. 394.



there are such cases. Thus, where a traveler was injured at a crossing by the breaking in two of a train, which was "entirely fortuitous" and could not have been prevented or foreseen by the railroad company, the court held that the company was not liable therefor.<sup>1</sup> The principle upon which the courts proceed in the class of cases referred to is that a person is not bound to anticipate or provide against extraordinary occurrences.<sup>2</sup> If the precautions taken and the care exercised are such as ordinary prudence requires, having regard to what may probably happen in the usual course of things, there is no liability.

As already stated, it is the duty of the traveler as well as the railroad company to observe reasonable care and precaution to avoid injury at crossings, and the failure of the traveler to perform this duty will, in general, defeat a recovery for any injury to which his want of care proximately contributes.<sup>3</sup> But if the injury could have been avoided by the company, in the exercise of due care, after it became aware of the danger of the traveler at the crossing, it may be held liable notwithstanding the traveler was negligent in approaching the crossing;<sup>4</sup> yet in

<sup>1</sup> *Buster v. Humphreys*, 34 Fed. Rep. 507. See, also, *Crutchfield v. Richmond, etc.*, R. R. Co., 76 N. Car. 320; *Miller v. Martin*, 16 Mo. 508, S. C. 57 Am. Dec. 242; *Williams v. Mich. Cent. R. R. Co.*, 2 Mich. 259. S. C. 55 Am. Dec. 59; *Ingalls v. Bills*, 43 Am. Dec. 346, and note.

<sup>2</sup> *Loftus v. Union Ferry Co.*, 84 N. Y. 455, S. C. 38 Am. R. 533; *Richards v. Rough*, 53 Mich. 212; *Pollock on Torts*, 36.

<sup>3</sup> *Lake Shore, etc., R. R. Co. v. Miller*, 25 Mich. 274; *North Penna. R. R. Co. v. Heilman*, 49 Pa. St. 60; *Bailey v. New Haven, etc., Co.*, 107 Mass. 496; *Indianapolis, etc., R. R. Co. v. Rutherford*, 29 Ind. 82; *Wilds v. Hudson River R. R. Co.*, 24 N. Y. 430; *Mynning v. Detroit, etc., R. R. Co.*, 64 Mich. 93, S. C. 8 Am. St. Rep. 804, and note; *Indiana, etc., Ry. Co. v.*

*Hammock*, 113 Ind. 1. It is not enough however, to defeat an action that the plaintiff was negligent, for negligence which does not proximately contribute to the injury will not bar an action. *Nave v. Flack*, 90 Ind. 205; *Louisville, etc., Co. v. Richardson*, 66 Ind. 43, 48, S. C. 32 Am. R. 94. Dr. Wharton states the rule thus: "Hence we may state as a general principle that, in order to defeat a recovery, the plaintiff's negligence must have been the proximate and not the remote cause of the injury." Judge Cooley's statement of the rule is: "The negligence that will defeat a recovery must be such as proximately contributed to the injury." *Cooley Torts*, 279. See, also, 1 *Shearm. & Redf. on Neg.*, 82, 94; *Beach on Contributory Negligence*, 7.

<sup>4</sup> *Kean v. Baltimore, etc., R. R. Co.*, 61 Md. 154, S. C. 19 Am. & Eng. R. R.

the absence of anything to the contrary, the servants of the company have a right to presume that a man upon its tracks who is apparently able get out of the way in time will do so.<sup>1</sup>

It is the duty of a traveler as he approaches a crossing to look out for trains.<sup>2</sup> He must make reasonable use of his senses, listening for the signals and looking up and down the track; and if, by neglecting to perform this duty he suffers injury, he will be held guilty of contributory negligence, which will ordinarily defeat an action against the company.<sup>3</sup> This rule requires the traveler to look out for "extras," and trains that are behind time as well as for regular trains running upon schedule time.<sup>4</sup> In some cases it is said that the traveler must stop and look and listen,<sup>5</sup> but we think this must depend upon circumstances and can not be invariably affirmed as matter of law.<sup>6</sup> There are also

Cas. 321; Indianapolis, etc., R. R. Co. v. McLin, 83 Ind. 435, S. C. 8 Am. & Eng. R. R. Cas. 237; Atchison, etc., R. R. Co. v. Walz (Kan.), 19 Pac. Rep. 787; Houston, etc., R. R. Co. v. Smith, 52 Tex. 178; 2 Thomp. on Neg., 1108; Pierce on Railroads, 325.

<sup>1</sup>Ohio & Miss. Ry. Co. v. Walker, 113 Ind. 196; Palmer v. Chicago, etc., R. R. Co., 112 Ind. 250; Beach on Con. Neg. 394.

<sup>2</sup>Penna. R. R. Co. v. Ogier, 35 Pa. St. 60, S. C. 78 Am. Dec. 322, and note; Durbin v. Oregon R. R. Co., 17 Ore. 5, S. C. 11 Am. St. Rep. 778, and note.

<sup>3</sup>Cincinnati, etc., R. R. Co. v. Butler, 103 Ind. 31, S. C. 23 Am. & Eng. R. R. Cas. 262; Peoria, etc., R. R. Co. v. Clayberg, 107 Ill. 644; Chicago, etc., R. R. Co. v. Still, 19 Ill. 499, Railroad Co. v. Houston, 95 U. S. 697, 702; Mynning v. Detroit, etc., R. R. Co., 64 Mich. 93; Glascock v. Central Ry. Co., 73 Cal. 137; Lavarencz v. Chicago, etc., R. R. Co., 56 Ia. 689; Tully v. Fitchburg R. R. Co., 134 Mass. 499; Brown v. Milwaukee, etc., R. R. Co., 22 Minn. 165; Stives v. Oswego, etc., R. R. Co., 18 N. Y. 422; Kellogg v. N. Y. Cent. R. R. Co., 79 N. Y. 72; North Penna. R. R.

Co. v. Beale, 73 Pa. St. 504, S. C. 13 Am. Rep. 753. See, also, numerous authorities cited in note to Ernst v. Hudson River R. R. Co., 90 Am. Dec. 780; Beach on Con. Neg. 401; Deering on Neg., section 252; Pierce on Railroads, 343.

<sup>4</sup>Wilcox v. Rome, etc., R. R. Co., 39 N. Y. 358, 362; Salter v. Utica, etc., R. R. Co., 75 N. Y. 273; Toledo, etc., R. R. Co. v. Jones, 76 Ill. 311; Schofield v. Chicago, etc., R. R. Co., 114 U. S. 615; Durbin v. Oregon R. R. Co., 17 Ore. 5, S. C. 11 Am. St. Rep. 778.

<sup>5</sup>Penna. R. R. Co. v. Beale, 73 Pa. St. 504; Lehigh Valley R. R. Co. v. Brandtmier, 113 Pa. St. 610; Greenwood v. Phila., etc., R. R. Co., 124 Pa. St. 572, S. C. 10 Am. St. Rep. 614; Shaber v. St. Paul, etc., R. R. Co., 28 Minn. 103; Dunning v. Bond, 38 Fed. Rep. 813.

<sup>6</sup>Pittsburgh, etc., R. R. Co. v. Wright, 80 Ind. 182, S. C. 5 Am. & Eng. R. R. Cas. 628; Huckshold v. St. Louis, etc., R. R. Co. (Mo.), 28 Am. & Eng. R. R. Cas. 659; Davis v. N. Y., etc., R. R. Co., 47 N. Y. 400; Kellogg v. N. Y. Cent. R. R. Co., 79 N. Y. 72; Tyler v. N. Y., etc., R. R. Co., 137 Mass. 238; Duffy v.

some exceptions to the rule that the traveler must look and listen which have been classified by the Supreme Court of Rhode Island,<sup>1</sup> as follows: "First. Where the view of the track is obstructed, and hence where the injured party, not being able to see, is obliged to act upon his own judgment at the time; in other words, where compliance with the rule would be impracticable or unavailing.<sup>2</sup> Second. Where the injured person was a passenger going to or alighting from a train, and hence under an implied invitation and assurance by the company to cross the track in safety.<sup>3</sup> Third. Where the direct act of some agent of the company had put the person off his guard and induced him to cross the track without precaution."<sup>4</sup> We may also add that the failure to look and listen will not defeat a recovery where an injury is willfully inflicted upon the traveler,<sup>5</sup> or where the servants of the company fail to use reasonable care to prevent it after discovering the traveler's danger.<sup>6</sup> The

Chicago, etc., R. R. Co., 32 Wis. 275; Eilert v. G. B. & C. R. R. Co., 48 Wis. 606; Peart v. Grand Trunk R. R. Co., 10 Ont. App. 191.

<sup>1</sup>In *Ormsbee v. Boston, etc., R. R. Co.*, 14 R. I. 102, S. C. 51 Am. Rep. 354. This case has met with some criticism and seems to be contrary to the weight of authority upon some points, but the classification of exceptions is probably as good as any that can be made in general terms.

<sup>2</sup>Citing *Commonwealth v. Fitchburg R. R. Co.*, 10 Allen, 189; *Craig v. N. Y., etc., R. R. Co.*, 118 Mass. 431; *Webb v. Portland, etc., R. R. Co.*, 57 Me. 117; *Johnson v. Hudson River R. R. Co.*, 20 N. Y. 66; *Continental Imp. Co. v. Stead*, 95 U. S. 161; *Perna. R. R. Co. v. Ogier*, 35 Pa. St. 60; *Fordham v. London, etc., Co.*, L. R. 3 C. P. 368; *Stubley v. London, etc., R. R. Co.*, L. R. 1 Ex. 13; *Dublin, etc., R. R. Co. v. Slattery*, 3 App. Cas. 1155. See, also, *Petty v. Hannibal, etc., R. R. Co. (Mo.)*, 28 Am. & Eng. R. R. Cas. 618, *Chicago, etc., R. R. Co. v. Hedges*, 105

*Ind.* 398, S. C. 25 Am. & Eng. R. R. Cas. 550.

<sup>3</sup>Citing *Brassell v. N. Y. Cent., etc., R. R. Co.*, 84 N. Y. 241; *Gaynor v. Old Colony, etc., R. R. Co.*, 100 Mass. 208; *Chaffee v. Boston, etc., R. R. Co.*, 104 Mass. 108; *Mayo v. Boston, etc., R. R. Co.*, 104 Mass. 137; *Wheelock v. Boston, etc., R. R. Co.*, 105 Mass. 203; *Stapley v. London, etc., R. R. Co.*, L. R. 1 Exch. 21.

<sup>4</sup>Citing *Warren v. Fitchburg R. R. Co.*, 8 Allen, 227. See, also, *Sweeny v. Old Colony R. R. Co.*, 87 Am. Dec. 644, and note; *Peck v. Mich., etc., R. R. Co. (Mich.)*, 19 Am. & Eng. R. R. Cas. 257; *Duane v. Chicago, etc., R'y Co. (Wis.)*, 40 N. W. Rep. 394.

<sup>5</sup>*Terre Haute, etc., R. R. Co. v. Graham*, 95 Ind. 286; *Louisville, etc., R. R. Co. v. Schmidt*, 106 Ind. 73, *Beach on Contrib. Neg.*, section 17, 22.

<sup>6</sup>*Donohue v. St. Louis, etc., R. R. Co. (Mo.)*, 28 Am. & Eng. R. R. Cas. 673; *Kelly v. Hannibal, etc., R. R. Co.*, 75 Mo. 138; *Morris v. Chicago, etc., R. R. Co.*, 45 Ia. 29, *Chicago, etc., R. R.*

rule has likewise been somewhat relaxed in favor of infants of tender years,<sup>1</sup> and it is generally for the jury to determine upon a consideration of their age and the circumstances of the case, whether they have exercised ordinary and reasonable care or not.<sup>2</sup> But absent-mindedness<sup>3</sup> or intoxication<sup>4</sup> will not excuse the failure to exercise ordinary care.

If a traveler is deaf or blind, or if he so wraps and muffles himself up that he can not hear or see well, he should be held to increased vigilance on that account,<sup>5</sup> and it may be stated generally that unusual difficulties require unusual precautions.<sup>6</sup> Thus, where the view is obstructed, the traveler, in the exercise of ordinary care under the circumstances, will usually be required to take precautions that might be entirely unnecessary if the view were not obstructed;<sup>7</sup> but if he does take all reasonable precautions the fact that he was misled and prevented by the obstructions from seeing an approaching train may be

*Co. v. Hogarth*, 38 Ill. 370; *Cleveland, etc., R. R. Co. v. Crawford*, 24 Ohio St. 631.

<sup>1</sup> *Chicago, etc., R. R. Co. v. Becker*, 84 Ill. 483; *McGovern v. N. Y. Cent. R. R. Co.*, 67 N. Y. 417; *Dowling v. Allen*, 88 Mo. 293; *Railroad v. Stout*, 17 Wall. 57; *Lynch v. Smith*, 104 Mass. 52; *Frick v. St. Louis, etc., R. R. Co.*, 75 Mo. 595; *Coombs v. New Bedford, etc., Co.*, 102 Mass. 572; *Penna. Co. v. Kelly*, 31 Pa. St. 372; *Rauch v. Lloyd*, 31 Pa. St. 358.

<sup>2</sup> *O'Connor v. Boston, etc., R. R. Co.*, 135 Mass. 352; *Dowling v. N. Y. Cent. R. R. Co.*, 90 N. Y. 670; *Evansich v. Railroad Co.*, 57 Tex. 126; 2 *Thomp. Neg.* 1182. There are cases, however, in which children may be held negligent as matter of law. *Wendell v. N. Y. Cent. R. R. Co.*, 91 N. Y. 420; *Moore v. Penna., etc., R. R. Co.*, 99 Pa. St. 301; *Dietrich v. Baltimore, etc., R. R. Co.*, 58 Md. 347.

<sup>3</sup> *Lake Shore, etc., R. R. Co. v. Miller*, 25 Mich. 274; *Baltimore, etc., R. R. Co. v. Whitacre*, 35 Ohio St. 627.

*Kean v. Baltimore, etc., R. R. Co.*,

61 Md. 154; *Houston, etc., R. R. Co. v. Sympkins*, 54 Tex. 615.

<sup>5</sup> *Purl v. St. Louis, etc., R. R. Co.*, 72 Mo. 168; *Central R. R. Co. v. Feller*, 84 Pa. St. 226; *Gonzales v. N. Y., etc., R. R. Co.*, 6 Robt. (N. Y.) 102; *Cleveland, etc., R. R. Co. v. Terry*, 8 Ohio St. 570; *Butterfield v. Western R. R. Co.*, 10 Allen, 532; *Salters v. Utica, etc., R. R. Co.*, 75 N. Y. 273; *Yancey v. Wabash, etc., R. R. Co. (Mo.)*, 6 S. W. R. 272. Compare *Petrie v. Columbia, etc., R. R. Co. (S. C.)*, 7 S. E. R. 515.

<sup>6</sup> *Nicholson v. Erie, etc., R. R. Co.*, 41 N. Y. 525; *Elkins v. Boston, etc., R. R. Co.*, 115 Mass. 190; *Rothe v. Milwaukee, etc., R. R. Co.*, 21 Wis. 256; *Penna. R. R. Co. v. State*, 61 Md. 108; *Baltimore, etc., R. R. Co. v. Whitacre*, 35 Ohio St. 627.

<sup>7</sup> *Thomas v. Delaware, etc., R. R. Co.*, 19 Blatchf. 533; *Strong v. Sacramento, etc., R. R. Co.*, 61 Cal. 326; *Johnson v. Chicago, etc., R. R. Co.*, 77 Mo. 546; *Atchison, etc., R. R. Co. v. Townsend*, 39 Kan. 115.

sufficient to determine his freedom from contributory negligence.<sup>1</sup>

One who attempts to pass between coupled cars of a freight train standing temporarily across a street, either knowing or having an opportunity to know by the reasonable use of his faculties that the train is likely to move at any moment, is guilty of such contributory negligence as will prevent a recovery for an injury sustained by the starting of the train.<sup>2</sup> So, a traveler who attempts to cross a railroad track in full view of an approaching train, upon a nice calculation of the chances, does so at his peril and must take the consequences;<sup>3</sup> but if the train is so far away, or the circumstances are such that a man of ordinary prudence, in the exercise of reasonable care, might have done so, his conduct will not necessarily constitute negligence as matter of law.<sup>4</sup> It is also held that a traveler who, seeing an engine standing near a crossing letting off steam in the usual manner, drives across in front of it, can not recover for personal injuries caused by his horse becoming frightened and running away.<sup>5</sup>

The relative duties of railroad companies and the owners of cattle at highway crossings are much the same as those of railroad companies and travelers at such crossings. Where cattle are lawfully upon a crossing the company and their owners are

<sup>1</sup> Penna., etc., *R. R. Co. v. Ogier*, 35 Pa. St. 60; *Strong v. S. & P. R. R. Co.*, 61 Cal. 326; *Faber v. St. Paul, etc., R'y Co.*, 29 Minn. 465; *Bunting v. C. P., etc., R. R. Co.*, 14 Nev. 351; *Chicago, etc., R. R. Co. v. Lee*, 87 Ill. 454.

<sup>2</sup> *Lake Shore, etc., R'y Co. v. Pinchin*, 112 Ind. 592. So, attempting to pass under or to climb over cars to which engines were attached has been held to be contributory negligence. *McMahon v. Railroad Co.*, 39 Md. 438; *Central R. R. Co. v. Dixon*, 42 Ga. 327; *Lewis v. Railroad Co.*, 38 Md. 588, 5 S. C. 17 A. N. Rep. 521.

<sup>3</sup> *Maryland, etc., R. R. Co. v. Neuber*, 62 Md. 391; *Grows v. Maine, etc., R. R. Co.*, 69 Me. 412, *Belleville, etc., R. R. Co. v. Hunter*, 33 Ind. 335.

*S. C. 5 Am. R.* 201; *Chicago, etc., R. R. Co. v. Fears*, 53 Ill. 115; *Kelly v. Hannibal, etc., R. R. Co.*, 75 Mo. 138; *Bohan v. Milwaukee, etc., R. R. Co.*, 61 Wis. 391; *Pierce on Railroads*, 345, N. Y., etc., *R. R. Co. v. Kellam*, 83 Va. 851.

<sup>4</sup> *Detroit, etc., R. R. Co. v. Van Steinberg*, 17 Mich. 99, *Langhoff v. Milwaukee, etc., R. R. Co.*, 19 Wis. 489; *Baxter v. Second Ave. R. R. Co.*, 30 How. Pr. 219; *Mentz v. Second Ave. R. R. Co.*, 3 Abb. Ct. App. 274; *Bonnell v. Delaware, etc., R. R. Co.*, 39 N. J. L. 189.

<sup>5</sup> *Union Pac. R. R. Co. v. Hutchinson*, 39 Kan. 485, S. C. 18 Pac. R. 705.

each bound to use ordinary care.<sup>1</sup> It is lawful for proper purposes to drive cattle upon a highway,<sup>2</sup> and whether the owner drove them with due care is usually a question for the jury.<sup>3</sup> At common law, allowing cattle unattended to run at large is deemed an illegal use of the highway sufficient to make the owner a wrong-doer.<sup>4</sup> But the matter is now regulated by statute in nearly every State. Where signals are required by statute they are usually for the protection of cattle as well as men, and when the negligent failure to give them causes injury to cattle upon a crossing the company will be liable therefor,<sup>5</sup> unless the owner is guilty of contributory negligence.<sup>6</sup>

<sup>1</sup> *Beers v. Housatonic R. R. Co.*, 19 Conn. 566; *Lane v. Kansas City, etc., R. R. Co.* (Kan.), 15 Am. & Eng. R. R. Cas. 526; *Kendig v. Chicago, etc., R. R. Co.*, 79 Mo. 207; *White v. Concord, etc., R. R. Co.*, 30 N. H. 188.

<sup>2</sup> *Midland R. R. Co. v. Daykin*, 17 C. B. 126.

<sup>3</sup> *Towne v. Nashua, etc., R. R. Co.*, 124 Mass. 101.

<sup>4</sup> *Corwin v. N. Y., etc., R. R. Co.*, 13 N. Y. 42, 49; *Chicago, etc., R. R. Co. v. Cauffman*, 28 Ill. 513; *Eames v. Salem, etc., R. R. Co.*, 96 Am. Dec. 676, and note; *Tonawanda, etc., R. R. Co. v. Munger*, 49 Am. Dec. 239, and note; *Cincinnati, etc., Co. v. Hiltzhauer*, 99 Ind. 488.

<sup>5</sup> *Turner v. Kansas City, etc., R. R. Co.*, 78 Mo. 578; *Chicago, etc., R. R. Co. v. Reid*, 24 Ill. 144; *Mobile, etc.,*

*R. R. Co. v. Malone*, 46 Ala. 391; *Washington v. Baltimore, etc., R. R. Co.*, 17 W. Va. 190; *Bemis v. Conn., etc., R. R. Co.*, 42 Vt. 375; *Cincinnati, etc., Co. v. Hiltzhauer*, 99 Ind. 488. A statute requiring railroads to "fence" also requires cattle-guards at crossings. *New Albany, etc., R. R. Co. v. Pace*, 13 Ind. 411; *Pittsburgh, etc., R'y Co. v. Eby*, 55 Ind. 567.

<sup>6</sup> See *Savannah, etc., R'y Co. v. Geiger*, 21 Fla. 669, S. C. 58 Am. Rep. 697, and note; *Eames v. Salem, etc., R. R. Co.*, 98 Mass. 560, S. C. 96 Am. Dec. 676, and note; *Tonawanda, etc., R. R. Co. v. Munger*, 5 Denio, 255, S. C. 49 Am. Dec. 239, and note 162, *et seq.* The entire subject of injuries to animals by railroads is elaborately treated in the note last referred to.

## CHAPTER XXXI.

### TRAVEL ON ROADS AND STREETS.

In order to prevent collisions, and to secure the greatest degree of safety and freedom from interruption to travelers upon roads and streets, it is necessary that certain rules should be observed by all who use such ways. A custom or system of rules regulating travel upon highways has grown up, which may properly be called "the law of the road," although this expression is usually applied to but one of the several rules on the subject. In some of the States there are statutes prescribing the law of the road, but they are simply the legislative enactments of what had already become a universal and established custom of our country.<sup>1</sup>

It is a general rule that one may travel upon any part of a highway not occupied at the time by another;<sup>2</sup> but if he meets another traveler, whom he desires to pass, or who desires to pass him, in either direction, there are certain rights and duties which each must observe in order to avoid a collision. In England, the customary rules of driving are these: First, in meeting, each party must keep to the left.<sup>3</sup> Secondly, in passing, the foremost person bearing to the left, the other shall pass on the off side. Thirdly, in crossing, the driver coming transverse shall bear to the left hand, so as to pass behind the other carriage.<sup>4</sup> In this country, however, a different custom, or sys-

<sup>1</sup> Shearm. & Redf. on Neg., section 308; *Daniels v. Clegg*, 28 Mich. 32, 44.

<sup>2</sup> *Dunham v. Rackliff*, 71 Me. 345; *Foster v. Goddard*, 40 Me. 64; *Daniels v. Clegg*, 28 Mich. 32; *Johnson v. Small*, 5 B. Mon. (Ky.) 25; *Aston v. Heaven*, 2 Esp. 533.

<sup>3</sup> This rule is thus stated in an old rhyme:

"'Tis a law of the road,  
Though a paradox quite,  
If you keep to the left,  
You'll always be right."

<sup>4</sup> *Angell on Highways*, section 328; 2 Steph. N. P. 984; *Petersdorf's Abr.*, 55, note; *Wayde v. Carr*, 2 Dow. & Ry. 255; *Turley v. Thomas*, 8 Carr. & P. 103.

tem of rules, has grown up, and we will now proceed to consider the duties of travelers to one another under the law as it exists in the United States.

The first and most important rule is, that, in meeting, each party shall bear or keep to the right,<sup>1</sup> instead of to the left as in England. If there is no statute upon the subject, proof of this custom is not necessary, for the court will take judicial knowledge of it.<sup>2</sup> Where a statute provides that travelers shall pass to the right of the "center of the road," the center of the wrought or traveled path is meant;<sup>3</sup> but when that part of the road which is wrought for travel is hidden by snow, and a path is beaten and traveled on the side of the wrought part, persons who meet upon the beaten path must drive to the right of the center of such beaten and traveled part.<sup>4</sup>

This rule requiring travelers who meet to pass to the right is not an inflexible one, and there may be circumstances requiring one to keep to the left in the particular case.<sup>5</sup> Emergencies may arise where, in order to escape from danger to oneself or to prevent injury to others, it will be not only excusable, but perfectly proper to temporarily violate the general rule. It has also been held that a horseman or light vehicle should give way to a wagon heavily loaded;<sup>6</sup> but the latter ought to be stopped, if due care requires it, while the lighter vehicle passes.<sup>7</sup> So, it has been held that the rule does not apply to the case of a building which is being moved through the streets.<sup>8</sup> Neither does the rule apply in the case of persons crossing or turning

<sup>1</sup> *McLane v. Sharp*, 2 Harr. (Del.) 481; *Kennard v. Burton*, 25 Me. 39, S. C. 43 Am. Dec. 249; *Daniels v. Clegg*, 28 Mich. 32; *Brooks v. Hart*, 14 N. H. 307; *Com. v. Allen*, 11 Met. 403; *O'Malley v. Dorn*, 7 Wis. 236; *Wrinn v. Jones*, 111 Mass. 360.

<sup>2</sup> *Lawson on Usages and Customs*, 17; *Leame v. Bray*, 3 East, 593; *Turley v. Thomas*, 8 Carr. & P. 104.

<sup>3</sup> *Clark v. Com.*, 4 Pick. 125; *Daniels v. Clegg*, 28 Mich. 32; *Earing v. Lansing*, 7 Wend. 185. But see *Com. v. Allen*, 11 Met. 403.

<sup>4</sup> *Jaquith v. Richardson*, 8 Met. 213; *Smith v. Dygert*, 12 Barb. 613.

<sup>5</sup> *Strouse v. Whittelsey*, 41 Conn. 559; *Wayde v. Carr*, 2 Dow. & R'y, 255; *Johnson v. Small*, 5 B. Mon. (Ky.) 25; *Wrinn v. Jones*, 111 Mass. 360.

<sup>6</sup> *Beach v. Parmeter*, 23 Pa. St. 196; *Grier v. Sampson*, 27 Pa. St. 183; *Washburn v. Tracey*, 2 D. Chip. 128; *Dudley v. Bolles*, 24 Wend. 465.

<sup>7</sup> *Kennard v. Burton*, 25 Me. 39, S. C. 43 Am. Dec. 249.

<sup>8</sup> *Graves v. Shattuck*, 35 N. H. 257, S. C. 69 Am. Dec. 536.



into the road.<sup>1</sup> A person driving across a road or street is bound to see that he does not obstruct public travel and unduly interfere with the rights of others passing along the way.<sup>2</sup> Street railway companies are also exempt from the requirements of this general rule, for their cars can not move from the track, and they are entitled to the free and unobstructed use thereof, but they can not unnecessarily obstruct crossings.<sup>3</sup> Travelers in other vehicles are not, however, obliged to refrain from using the track at all times. They have a right to drive or walk upon and along the track as well as to cross it, provided they exercise due care and do not impede the cars.<sup>4</sup>

One who violates the law of the road by driving on the wrong side of the way assumes the risk of all such experiments, and must use greater care than if he had kept upon the right side of the road.<sup>5</sup> If a collision takes place the presumption is generally against the party upon the wrong side.<sup>6</sup> Especially is this true where the collision takes place in the dark.<sup>7</sup> But the mere fact that one is on the wrong side of the road, in violation of the law, gives another no right to neglect all precautions, and if, by the exercise of ordinary care, the latter might prevent a collision notwithstanding the fault of the former, but

<sup>1</sup> *Lovejoy v. Dolan*, 10 Cush. 495; *Lloyd v. Ogleby*, 5 C. B. (N. S.) 667, *Morse v. Sweeney*, 15 Bradw. (Ill. App.) 486.

<sup>2</sup> *Fales v. Dearborn*, 1 Pick. 345; *Palmer v. Barker*, 11 Me. 338.

<sup>3</sup> *Hegan v. Eighth Ave. R. R. Co.*, 15 N. Y. 380; *Adolph v. Central Park, etc.*, R. R. Co., 65 N. Y. 554; *Same v. Same*, 76 N. Y. 530; *Com. v. Temple*, 14 Gray, 69, *Suydam v. Grand St. R. R. Co.*, 41 Barb. 375. See, also, *McCarty v. State*, 37 Miss. 411; *Shea v. Potrero, etc.*, Co., 44 Cal. 414, *Citizens' Coach Co. v. Camden Horse R. R. Co.*, 33 N. J. Eq. 267, S. C. 36 Am. Rep. 542; *State v. Foley*, 31 Ia. 527, S. C. 7 Am. Rep. 166.

<sup>4</sup> *Adolph v. Central Park R. R. Co.*, 76 N. Y. 530; *Same v. Same*, 65 N. Y. 554, *Shea v. Potrero, etc.*, Co., 44 Cal.

414. See *Wilbrand v. Eighth Ave. R. R. Co.*, 3 Bosw. 314; *Gov't St. R'y Co. v. Hanlon*, 53 Ala. 70. Compare *Citizens' Coach Co. v. Camden Horse R. R. Co.*, 33 N. J. Eq. 267, S. C. 36 Am. Rep. 542, where it was held that a rival coach company might be excluded from the track. In Louisiana it is a trespass to walk upon the track. *Johnson v. Canal St. R'y Co.*, 27 La. Ann. 53.

<sup>5</sup> *Brooks v. Hart*, 14 N. H. 307; *Cruden v. Fentham*, 2 Esp. 685; *Pluckwell v. Wilson*, 5 C. & P. 375, *Chaplin v. Hawes*, 3 C. & P. 554; *Wilson v. Rockland, etc.*, Co., 2 Harr. 67; *Cooley on Torts*, 666.

<sup>6</sup> *Burdick v. Worrall*, 4 Barb. 596; *Spofford v. Harlow*, 3 Allen, 176; *Brooks v. Hart*, 14 N. H. 307; *Shearm. & Redf. Neg.*, section 309.

<sup>7</sup> *Cruden v. Fentham*, 2 Esp. 685.

fails to do so, he has no cause to complain.<sup>1</sup> Parties lawfully using a public street, however, owe to each other the duty of exercising ordinary and reasonable care, and each is justified, in the absence of anything to the contrary, in assuming that the other will so act.<sup>2</sup>

The second general rule upon this subject relates particularly to the duties of travelers in passing, where both are going in the same direction. In England, as we have seen, the traveler who desires to pass must do so upon the off side of the forward traveler, who, at the same time, bears to the left. In this country, however, there is no such rule. The leading traveler is not bound to turn either to the one side or the other, if there is sufficient room to pass on either side.<sup>3</sup> If there be not sufficient room it is said to be "the duty of the foremost traveler to afford it, on request made, by yielding an equal share of the road, if that be adequate and practicable; if not, the object must be deferred till the parties arrive at ground more favorable to its accomplishment."<sup>4</sup> But it is, perhaps, doubtful if such duty can be deemed an absolute legal duty, and even if it should be so considered, the failure of the leading traveler to perform it by turning out to one side will not justify the other in purposely running into him or attempting to pass at all hazards.<sup>5</sup> The only rule of general application that can be laid down is that he who attempts to pass another going in the same direction must do so in such manner as may be most conven-

<sup>1</sup> *Parker v. Adams*, 12 Met. 415, S. C. 46 Am. Dec. 694; *Bigelow v. Reed*, 51 Me. 325; *Palmer v. Barker*, 11 Me. 338; *Baker v. Portland*, 58 Me. 199, S. C. 4 Am. Rep. 274; *O'Malley v. Dorn*, 7 Wis. 236, S. C. 73 Am. Dec. 403; *Clay v. Wood*, 5 Esp. 44; *Davies v. Mann*, 10 M. & W. 546; *Turley v. Thomas*, 8 Carr. & P. 103. And see *Hoffman v. Union Ferry Co.*, 68 N. Y. 385; *Lane v. Atlantic Works*, 107 Mass. 104; *Andus v. Saratoga*, 1 Fed. Rep. 730.

<sup>2</sup> *Baker v. Fehr*, 97 Pa. St. 70; *Daniels v. Clegg*, 28 Mich. 32; *Harpell v. Curtis*, 1 E. D. Smith, 78. See *Piggott v. Lilly (Ia.)*, 27 N. W. Rep. 3.

<sup>3</sup> *Bolton v. Colder*, 1 Watts. 360; *Angell on Highways*, section 340; *Clay v. Wood*, 5 Esp. 44.

<sup>4</sup> *Angell on Highways*, section 340. Compare *Fopper v. Wheatland*, 59 Wis. 623; *Mochler v. Shaftsbury*, 46 Vt. 580, S. C. 14 Am. Rep. 634.

<sup>5</sup> See *Avegno v. Hart*, 25 La. Ann. 235, S. C. 13 Am. Rep. 133; *Center v. Finney*, 17 Barb. 94. One driving behind another may pass either on the right or the left side according as the one or the other may be safest and most convenient under the circumstances. *Clifford v. Tyman*, 61 N. H. 508.

ient under the circumstances of the case, and if damage result to the person passed, the former must answer for it, unless the latter by his own recklessness or carelessness brought the disaster upon himself.<sup>1</sup>

All persons have a right to walk in a public highway as well as to ride or drive upon it; their rights are equal, and both footmen and drivers are required to exercise such care and prudence as the circumstances demand.<sup>2</sup> The fact that a footman undertakes to cross a street at a place other than a regular crossing for footmen will not, of itself, defeat an action against a horseman who negligently injures him by recklessly riding or driving against him.<sup>3</sup> Thus, in a recent case, the court said: "A person on foot has, however, a right to cross the street where he pleases, and the inquiry is the same, whether, under the circumstances in any given case, he does so with due caution."<sup>4</sup> The defendant was held liable, in the case cited, for the negligence of his driver in running over a child under seven years of age.

Accidents to footmen usually occur at crossings, and, while it is generally the duty of persons who are driving over a crossing for foot-passengers to drive slowly, cautiously, and carefully, it is also the duty of the footman to use due care in going upon a crossing.<sup>5</sup> Thus, where a footman attempted to cross a street in the city of New York in front of a rapidly moving cart and other vehicles, and was injured by coming in contact with the cart, it was held that he could not recover for such injury, the court saying: "It is negligence *per se* for a foot trav-

<sup>1</sup> *Avegno v. Hart*, 25 La. Ann. 235, S. C. 13 Am. Rep. 133, and note 135; *Burnham v. Butler*, 31 N. Y. 480, opinion of Potter, J.; *Bolton v. Colder*, 1 Watts. 360; *Knowles v. Crampton* (Conn.), 11 Atl. Rep. 593. This is also the rule as to vessels. *The Charles Morgan*, 6 Fed. Rep. 913; *The Ant*, 10 Fed. Rep. 294.

<sup>2</sup> *Brooks v. Schwerin*, 54 N. Y. 343; *Barker v. Savage*, 45 N. Y. 191, S. C. 6 Am. Rep. 66; *Coombs v. Purrington*, 42 Me. 332; *Boss v. Litton*, 5 Carr. & P. 407; *Robinson v. Railroad Co.*, 48

Cal. 410; *Simons v. Gaynor*, 89 Ind. 165.

<sup>3</sup> *Simons v. Gaynor*, 89 Ind. 165. See, also, *Raymond v. Lowell*, 6 Cush. 524, S. C. 53 Am. Dec. 57.

<sup>4</sup> *Moebus v. Hermann*, 108 N. Y. 349, S. C. 2 Am. St. Rep. 440.

<sup>5</sup> *Williams v. Richards*, 3 Car. & K. 81, 82; *Cotton v. Wood*, 8 C. B. (N. S.) 571; *Wolf v. Beard*, 8 Carr. & P. 373; *Baxter v. Second Ave. R. R. Co.*, 30 How. Pr. (N. Y.) 219; *Belton v. Baxter*, 54 N. Y. 245; *Chafee v. Boston, etc., Co.*, 104 Mass. 108.

eler to attempt to cross a public thoroughfare ahead of vehicles of any kind under such circumstances, upon nice calculations of the chances of injury."<sup>1</sup> Reasonable care, under the circumstances, however, is all that can be required, and it has been held by the same court that the duty imposed upon a wayfarer at the crossing of a street by a railroad track, to look both ways, does not, as a matter of law, attach to a person about to cross from one side to the other of a city street.<sup>2</sup>

Children and infirm persons,<sup>3</sup> as well as those who are of mature years and in good health, have a right to walk along or across the streets of a city, and while so doing they may properly assume, in the absence of anything to the contrary, that carriages and horses will not be driven over the streets at a dangerous and improper rate of speed.<sup>4</sup> One who drives horses along the streets of a city is bound to anticipate that travelers on foot may be at the crossings, and must take reasonable care not to injure them.<sup>5</sup> It can not, therefore, be said, as a matter of law, that a footman, whether of full age or an infant, who does not anticipate, and take special precautions against, injury from the reckless conduct of horsemen in riding or driving at an unusual and dangerous rate of speed is guilty of contributory negligence.<sup>6</sup>

The "law of the road," in its strict sense, does not obtain with respect to footmen; they may meet and pass on either side, and drivers of carriages or other vehicles may also pass

<sup>1</sup> *Belton v. Baxter*, 54 N. Y. 245, S. C. 13 Am. Rep. 578. But the question of negligence must usually be left to the jury. *Same v. Same*, 58 N. Y. 411; *Thurber v. Harlem, etc., Co.*, 60 N. Y. 326; *Quick v. Holt*, 99 Mass. 164.

<sup>2</sup> *Moebus v. Hermann*, 108 N. Y. 349, S. C. 2 Am. St. Rep. 440. See, also, *Williams v. Grealy*, 112 Mass. 79; *Shapleigh v. Wyman*, 134 Mass. 118; *Stringer v. Frost*, 116 Ind. 477.

<sup>3</sup> *Birkett v. Knickerbocker Ice Co.*, 110 N. Y. 504; *Moebus v. Hermann*, 108 N. Y. 349, S. C. 2 Am. St. Rep. 440; *Boss v. Litton*, 5 Carr. & P. 407; *Vaughn v. Scade*, 30 Mo. 605.

<sup>4</sup> *Stringer v. Frost*, 116 Ind. 477; *Davenport v. Ruckman*, 37 N. Y. 568. But see as to the degree of care required of infirm persons. *Peach v. Utica*, 10 Hun. 477; *Winn v. Lowell*, 1 Allen, 177; *Sleeper v. Sandown*, 52 N. H. 244; *Centralia v. Krouse*, 64 Ill. 19; *Neff v. Wellesley*, 148 Mass. 487.

<sup>5</sup> *Murphy v. Orr*, 96 N. Y. 14; *Birkett v. Knickerbocker Ice Co.*, 110 N. Y. 504.

<sup>6</sup> *Coombs v. Purrington*, 42 Me. 332; *Williams v. Richards, Carr. & K.* 81; *Stringer v. Frost*, 116 Ind. 477.

footmen on either side, all that is required being the exercise of due and reasonable care under the circumstances.<sup>1</sup> As among themselves the degree of care required by foot-passengers is such as the nature of the way, the number of people upon it, and other circumstances demand, and must, it is said, depend in a great measure upon the injury likely to happen if such care is not observed. Thus, a man walking upon a sidewalk in a large city, among a crowd of people, carrying edged tools or other dangerous or unwieldy instruments, would have to take special precautions not to injure other footmen.<sup>2</sup>

It has been held, and correctly as we think, that a person who transports articles over the highway, which are of an unusual character and likely to frighten horses, is bound to employ a sufficient number of persons to give warning to travelers and, if need be, to assist them in passing.<sup>3</sup> It can not be unknown to any one that ordinary roads are primarily and chiefly for use by persons on foot, on horseback, or in vehicles drawn by horses, and one who undertakes to transport an article which a reasonably prudent man would apprehend would frighten horses is in duty bound to employ reasonable means to prevent injury to persons riding or driving along the road.

Driving at an immoderate and dangerous rate of speed upon crowded streets or much frequented highways is culpable negligence;<sup>4</sup> but it is not negligence *per se* to drive a team at a "lively trot," even in the streets of a city.<sup>5</sup> In the absence of a city ordinance, one so driving is not limited to any particular rate of speed, but is simply bound to use proper care and prudence under the circumstances, so as not to injure others.<sup>6</sup> The rate of speed should be proportioned to the danger.<sup>7</sup> Reckless and

<sup>1</sup> *Cotterell v. Starkey*, 8 Carr. & P. 691; *Lloyd v. Ogelby*, 5 C. B. (N. S.) 667; Angell on Highways, section 341.

<sup>2</sup> Addison on Torts, section 555.

<sup>3</sup> *Bennett v. Lovell*, 12 R. I. 166, S. C. 34 Am. Rep. 628.

<sup>4</sup> *Kennedy v. Way*, Bright (Pa.), 186, S. C. 3 Law Rep. (N. S.) 184; *Cotterell v. Starkey*, 8 Carr. & P. 691, and note 694. See, also, *Garmon v. Bangor*, 38 Me. 443, *Schaabs v. Woodburn*, etc.,

Co., 56 Mo. 173; *Stokes v. Saltonstall*, 13 Peters, 181.

<sup>5</sup> *Crocker v. Knickerbocker Ice Co.*, 92 N. Y. 652; *Brennan v. Friendship*, 67 Wis. 223; *Carter v. Chambers*, 79 Ala. 223.

<sup>6</sup> *Crocker v. Knickerbocker Ice Co.*, 92 N. Y. 652.

<sup>7</sup> *Davies v. Mann*, 10 M. & W. 546; *Moody v. Osgood*, 60 Barb. 644; *Williams v. Richards*, 3 Carr. & P. 81;

noisy driving, whereby another's horse is frightened and caused to run away, will constitute actionable negligence.<sup>1</sup> The fact that a person is violating a city ordinance against fast driving is admissible in evidence upon the question of negligence, but is not invariably conclusive upon that point.<sup>2</sup> In a recent case decided by the Illinois Court of Appeals, it is held that a city ordinance against immoderate driving has the force and effect of a statute and is binding upon the fire department as well as upon the drivers of ordinary vehicles, and that the rights of the fire department are not so superior to those of ordinary citizens as to exempt them from the rules of the common law, requiring the exercise of proper prudence and care in the use of the streets, so as not to cause injuries to other persons lawfully upon them.<sup>3</sup> It is, in general, true that an ordinance of a municipal corporation has the effect of a local law, and that one who disobeys it is guilty of an actionable wrong.<sup>4</sup> Where there is an ordinance regulating the speed at which horses may be driven, it is no more than reasonable to hold that a person who is himself using due care may act upon the assumption that it will be obeyed. This presumption can not, however, prevail where the circumstances clearly indicate that the ordinance is not regarded.

There may be a criminal as well as a civil liability for injuries caused by fast and willfully reckless driving. Thus, where two persons with horses and carts raced upon a highway, and one of them ran over and killed a footman, it was held that

*Kelsey v. Barney*, 12 N. Y. 425. See, also, *Vaughn v. Scade*, 30 Mo. 600, 605.

<sup>1</sup> *Howe v. Young*, 16 Ind. 312; *Burnham v. Butler*, 31 N. Y. 480; *Welch v. Lawrence*, 2 Chit. 262.

<sup>2</sup> See *Wright v. Malden R. R. Co.*, 4 Allen, 283; *Hall v. Ripley*, 119 Mass. 135; *Hall v. Ripley*, 119 Mass. 135; *Steele v. Burkhardt*, 104 Mass. 59, S. C. 6 Am. Rep. 191; *Hanlon v. South Boston R. R. Co.*, 129 Mass. 310. Compare *Jetter v. N. Y.*, etc., R. R. Co., 2 Abb. App. Dec. 458; *Atlanta*, etc., R. R. Co. v. *Wyly*, 65 Ga. 120.

<sup>3</sup> *Morse v. Sweeney*, 15 Bradw. 486,

citing *Penna. Co. v. Frana*, 13 Bradw. 97. The correctness of this decision admits of some doubt. The emergency arising from a fire may require very rapid driving, and even an ordinary citizen, we suppose, would be justified in riding or driving at a high rate of speed in an emergency in order to save his property from destruction, or to save life by calling a physician, if he uses due care under the circumstances.

<sup>4</sup> *Penna. Co. v. Stegemeier*, 118 Ind. 305; *Blanchard v. Bissell*, 11 Ohio St. 96; *State v. Lee*, 4 Crim. Law Mag. 79;

both were guilty of manslaughter, upon the principle that where two persons incite each other to do an unlawful act whereby one of them kills another, both are guilty.<sup>1</sup> So, in Pennsylvania, it has been held that driving at the rate of a mile in four minutes is unlawful, and where death resulted from a collision thus caused, without the fault of the injured party, the defendant was held guilty of murder in the second degree.<sup>2</sup> In Illinois, where the defendant drove a horse and vehicle behind another conveyance, knowing the danger of a collision and the probable result, and recklessly and willfully permitted a collision, which resulted in death, without using reasonable means at his command to avert it, he was held guilty of manslaughter.<sup>3</sup> So, in Indiana, it was held, on appeal, that one who recklessly rode a bicycle against a person on a sidewalk was rightly adjudged to have committed an assault and battery.<sup>4</sup> The principle which undergirds these cases is a very old one, and finds a strong illustration in the ancient case wherein it was held that one who carelessly cast logs upon a highway and killed a traveler thereon was guilty of murder in the second degree.<sup>5</sup> It is further exemplified in the cases which declare it to be unlawful to drive an unbroken or unmanageable horse among a throng of persons.<sup>6</sup>

A traveler who drives upon a highway must use due care to keep his harness and carriage in good road-worthy condition, so that injuries may not be caused to others by reason of the insufficiency of those articles. As said in the old English cases, he "is bound to have a good tackle, and is negligent if he does

<sup>1</sup> *Regina v. Swindall*, 2 Car. & K. 230. See, also, *Rex v. Timmins*, 7 Carr. & P. 499. This doctrine rests upon the principle, often recognized, that recklessness or even negligence may sometimes supply the place of an actual intent. *Palmer v. Chicago*, etc., R. R. Co., 112 Ind. 250; *Cincinnati, etc., Co. v. Cooper*, 120 Ind. 469; 1 Hale's P. C. (Am. ed.) 479; 1 Bishop Crim. Law, Chapter 20; 1 Bishop Crim. Law, section 324.

<sup>2</sup> *Kennedy v. Way*, Bright, 186.

<sup>3</sup> *Belk v. People*, 125 Ill. 586.

<sup>4</sup> *Mercer v. Corbin*, 117 Ind. 450.

<sup>5</sup> 4 Blackst. Com., 182; 1 Hale's P. C. (Am. ed.) 479.

<sup>6</sup> *Glore v. McIntire*, 121 Ind. 162; *Meredith v. Reed*, 26 Ind. 334; *Michael v. Alestree*, 2 Levinz, 172; *Dickson v. McCoy*, 39 N. Y. 400; *McIlvaine v. Lantz*, 100 Pa. St. 586.

not."<sup>1</sup> The mere fact that the harness breaks or a wheel runs off, or the like, is not, however, negligence *per se*;<sup>2</sup> and the owner should not be held liable for a pure accident, nor for an injury caused by a defect in his "tackle" which he did not know, and could not discover by the use of ordinary and reasonable care. He is not an insurer of his "tackle," and we do not think the expression above quoted from the old English cases was intended to be understood as declaring it to be his absolute duty to keep his carriage and harness safe at all events, under penalty of being held guilty of negligence notwithstanding he had used reasonable care in the matter. The correct rule is thus stated by Judge Thompson in his work on negligence: "The obvious rule here is, that if damages are inflicted by reason of the breaking of the carriage or tackle of a traveler on the highway, the traveler or owner of the tackle or vehicle is liable only on the principle of want of ordinary care."<sup>3</sup> This is unquestionably the true rule, for only those who enjoy unusual privileges, or undertake unusual things, are considered as warrantors or insurers, and a traveler simply exercises a right free and common to all when he drives along a road or street.

The mere fact that a horse is found running away upon a highway is not conclusive evidence of negligence on the part of its owner or custodian, but may be explained by facts or circumstances showing the exercise of due care.<sup>4</sup> If, however, no explanation is given, negligence will be presumed.<sup>5</sup> So, if the driver loses control of his horse by his own fault, he can not free himself from liability to one who is injured by showing that he could not control the horse at the time of the injury.<sup>6</sup> It has also been held that the mere fact of horses getting loose and running away after being hitched is some evidence of neg-

<sup>1</sup> *Welsh v. Lawrence*, 2 Chitty, 262; 212; *Griggs v. Fleckenstein*, 14 Minn. 81; *Cotterill v. Starkey*, 8 Carr. & P. 691; 81; *Street v. Laumier*, 34 Mo. 459. *Springett v. Ball*, 4 Fost. & Fin. 472. <sup>5</sup> *Hummell v. Wester*, Bright (Pa.), 133; *Unger v. Forty-Second St., etc., Co.*, 51 N. Y. 497, 500; *Dickson v. McCoy*, 39 N. Y. 400. See, also, *Gannon v. Wilson* (Pa.), 5 Atl. R. 381.

<sup>2</sup> *Doyle v. Wragg*, 1 F. & F. 7.

<sup>3</sup> 1 Thomp. on Neg. 381.

<sup>4</sup> *Gottwald v. Bernheimer*, 6 Daly,

<sup>6</sup> *Kennedy v. Way*, Bright, 186.



ligence in the manner of hitching them.<sup>1</sup> Leaving a horse unhitched upon a highway is not negligence *per se*, especially if it is left in charge of a competent person to watch it.<sup>2</sup> The question of negligence in such cases is generally left to the jury.<sup>3</sup> Turning a horse loose in the streets of a populous city is negligence, and one who does so is liable for personal injuries caused by the horse, without allegation or proof that he knew the horse was vicious.<sup>4</sup> So, where a horse runs away by reason of the negligence of its owner he will be liable to one who is injured thereby, without fault on his part, unless there is something to take the case out of the general rule;<sup>5</sup> but the mere fact that injuries are caused by a runaway horse will not make the owner liable, in the absence of negligence on the part of himself or his servant.<sup>6</sup>

<sup>1</sup>Strup v. Edens, 22 Wis. 432. See Rumsey v. Nelson, 58 Vt. 590, S. C. 3 Atl. R. 484.

<sup>2</sup>Dexter v. McCready, 54 Conn. 171, S. C. 5 Atl. R. 855; Park v. O'Brien, 23 Conn. 339; Wasmer v. Dela., etc., R. R. Co., 80 N. Y. 212; 1 Thomp. Neg., 389. Compare Western Union Tel. Co. v. Quinn, 56 Ill. 319; Gray v. Second Ave. R. R. Co., 65 N. Y. 561; Illidge v. Goodwin, 5 Carr. & P. 190; McCahill v. Kipp, 2 E. D. Smith (N. Y.), 413.

<sup>3</sup>Griggs v. Fleckenstein, 14 Minn. 81; Albert v. Bleecker St. R. R. Co., 2 Daly, 389; Goodman v. Taylor, 5 Carr. & P. 410; Bigelow v. Reed, 51 Me. 325; Dexter v. McCready, 54 Conn. 171; Bott v. Pratt, 33 Minn. 325; Lynch v. Nurdin, 1 Q. B. 29; Phillips v. Dewald, 79 Ga. 732, S. C. 11 Am. St. R. 458. In the case last cited it was held that the jury might well infer negligence where a restless, spirited horse was left unhitched in a busy, noisy street while the driver was six feet away from him, notwithstanding he was easily controlled under ordinary circumstances, and had never before run away although he had often been left unhitched.

<sup>4</sup>Goodman v. Gay, 15 Pa. St. 188, S. C. 53 Am. Dec. 589; Rossell v. Cottom, 31 Pa. St. 526; Dickson v. McCoy, 39 N. Y. 400; Baldwin v. Ensign, 49 Conn. 113, S. C. 44 Am. R. 205.

<sup>5</sup>Wagner v. Goldsmith, 78 Ind. 518; Hummel v. Wester, Bright, 133; Kennedy v. Way, Bright, 186; McCahill v. Kipp, 2 E. D. Smith, 413; Frazer v. Kimler, 2 Hun. 514; Dickson v. McCoy, 39 N. Y. 400; Barnes v. Chapin, 4 Allen, 444; Lyons v. Merrick, 105 Mass. 76; Herlihy v. Smith, 116 Mass. 265. The fact that the fright of a horse which has been left unhitched is increased by the efforts of persons trying to stop him will not exonerate his owner from liability. Phillips v. Dewald, 79 Ga. 732, S. C. 11 Am. St. R. 458.

<sup>6</sup>Shawhan v. Clarke, 24 La. Ann. 390; Sullivan v. Scripture, 3 Allen, 564; Weldon v. Harlem R. R. Co., 5 Bosw. (N. Y.) 576; Hammack v. White, 11 C. B. (N. S.) 587; Fallon v. O'Brien, 12 R. I. 518, S. C. 34 Am. R. 713; Bennett v. Ford, 47 Ind. 264; Brown v. Collins, 53 N. H. 442, S. C. 16 Am. R. 372. See, also, the English case of Holmes v. Mather, reported in note to the case last cited, 16 Am. R. 384.

Where a runaway results from the negligence of the driver, his liability is not confined to one who is injured, either in person or property, by direct contact with the runaway team. The running away of the team will generally be deemed the efficient and proximate cause of the injury, if it puts in operation the force which was the immediate and direct cause of the injury.<sup>1</sup> Thus, where a team, negligently left unhitched in a much frequented street of a town or city, runs away, and, after an attempt on the part of different persons in the street to stop it, runs into another team properly hitched at the side of the street, and causes the latter team to run away and collide with another horse properly standing on the street, the driver of the team which first ran away is liable to the owner of the horse against which the second team ran, upon the ground that the injury to him was the natural and proximate result of the driver's negligence in the first instance.<sup>2</sup>

The effect of contributory negligence upon the part of one who is injured while riding or driving upon a highway, and the rules applicable to such a case, are, in general, the same as in other cases of contributory negligence. We need not, therefore, consider this branch of the subject at length, especially as particular instances of contributory negligence and the effect thereof have already been given in treating generally of the rights and duties of travelers. There is, however, one matter which deserves further consideration, and that is the doctrine of "imputable negligence," by which the contributory negligence of a driver, although not the servant of the passenger, is imputed to the latter. This doctrine long prevailed in England and yet prevails, in a modified form at least, in some of

<sup>1</sup>For interesting discussions of the doctrine of proximate cause, and the liability of the original wrong-doer, notwithstanding an intervening agency, see *Billman v. Indianapolis*, etc., R. R. Co., 76 Ind. 166; *Weick v. Lander*, 75 Ill. 93; *McDonald v. Snelling*, 92 Am. Dec. 768, and note, 776; *Thomas v. Winchester*, 57 Am. Dec. 455, and note, 461; *Forney v. Geldmacher*, 42

Am. R. 388, and note, 390; *White v. Conly*, 52 Am. R. 154, and note, 157.

<sup>2</sup>*Griggs v. Fleckenstein*, 14 Minn. 81, S. C. 100 Am. Dec. 199. To same effect, where a third person was injured by a team caused to run away by the negligence of the defendant in driving his own horse, see *McDonald v. Snelling*, 14 Allen, 290, S. C. 92 Am. Dec. 768.

our own States. In the leading case<sup>1</sup> upon the subject, in which the rule seems first to have been formulated, it appeared that a passenger who had alighted from an omnibus was run over and injured by an omnibus belonging to another line. He brought his action against the proprietor of the latter line, and the court instructed the jury that if the negligence of the driver of the vehicle in which he was a passenger, in not driving close enough to the curb, contributed to the injury, they should find for the defendant, although the driver of his omnibus was also guilty of negligence. This ruling was expressly based upon the doctrine that "the deceased must be considered as identified with the driver of the omnibus in which he voluntarily became a passenger, and that the negligence of the driver was the negligence of the deceased." This case has been followed by several of our own courts,<sup>2</sup> but many others have declined to follow it, and as it was recently overruled by the English Court of Appeals,<sup>3</sup> after an elaborate consideration of the question, it is probable that all of the courts will, in the future, decline to apply the rule therein announced. In Pennsylvania, a distinction is made between cases in which the plaintiff is injured while traveling in a public conveyance and those in which he is injured while riding in a private conveyance. The old English rule of "imputable negligence" is followed in the former case upon grounds of supposed public policy,<sup>4</sup> but denied in the latter case.<sup>5</sup> As said in a recent case, however, "there does not seem to be any substantial ground upon which to rest such a distinction. The inquiry in either case must be, was the relation of the person whose negligence is sought to be attributed to the person injured such that the latter had at least an equal right to direct and control the movements of the conveyance, or that he would have been jointly liable to a third

<sup>1</sup> *Thorogood v. Bryan*, 8 C. B. 115.

<sup>2</sup> *Prideaux v. Mineral Point*, 43 Wis. 513, S. C. 28 Am. Rep. 558; *Houfe v. Fulton*, 29 Wis. 296; *Carlisle v. Sheldon*, 38 Vt. 440; *Lake Shore, etc., Co. v. Miller*, 25 Mich. 274. See, also, *Tp. of Crescent v. Anderson*, 114 Pa. St. 643; *Stafford v. Oskaloosa*, 57 Ia. 748.

<sup>3</sup> *The Bernina*, 12 Prob. Div. 58, reported also in note to *Borough of Carlisle v. Brisbane*, 57 Am. Rep. 483, 494. See, also, *The Milan*, Lush. Adm. 388.

<sup>4</sup> *Lockhart v. Lichtenthaler*, 46 Pa. St. 151.

<sup>5</sup> *Borough of Carlisle v. Brisbane*, 113 Pa. St. 544, S. C. 57 Am. Rep. 483.

person for the consequences of the negligent conduct of the former?"<sup>1</sup>

The rules applicable to cases of concurring negligence have been formulated substantially as follows: 1. If the plaintiff is without fault and there is negligence on the part of the defendant and another independent person over whom the plaintiff has no control, "both negligences partly directly causing the accident," the plaintiff may maintain an action for all the damages so caused him against either the defendant or the other wrongdoer. 2. If, in like case, the negligence is partly that of the defendant personally, and partly that of his servant, the plaintiff can maintain an action either against the defendant or his servant. 3. If the negligence is that of the defendant's servant, although the defendant may be free from personal negligence, the plaintiff can maintain an action against either. 4. If the negligence, although not that of the defendant personally nor of his servant, consists of an act or omission of another, so done or omitted by the order, direction, or authority of the defendant the plaintiff can maintain an action either against the defendant or such third person. 5. Although the plaintiff either in person or through his servant has been guilty of negligence, if such negligence "did not directly partly cause the accident," the plaintiff can maintain an action against the defendant who did cause it. 6. If the plaintiff is personally guilty of negligence which "partly directly" caused the accident, he can not maintain an action against any one. 7. So, if the defendant's servant is guilty of negligence which "partly directly" caused the accident, the plaintiff can maintain no action. 8. Notwithstanding the defendant or his servant may have been guilty of negligence, the plaintiff can not, as a general rule, maintain an action, if, by the exercise of reasonable care, he or his servant could have avoided the accident.

The rules above stated apply where the relation of the passenger and driver is that of master and servant, but they do not all apply where no such relation exists. The law is now well settled, contrary to the old English doctrine, that where one becomes a passenger in a public or a private conveyance be-

<sup>1</sup>Town of Knightstown v. Müsgrove, 116 Ind. 121, S. C. 9 Am. St. Rep. 827, 831.

longing to another, over the driver and management of which he has no control, without suspecting or having any reason to suspect that the driver is imprudent or incompetent, the negligence of the driver will not be imputed to him so as to prevent his recovery for an injury caused by another upon the ground of contributory negligence.<sup>1</sup> But if the plaintiff voluntarily joins the driver in taking an obvious and known risk, such as attempting to pass by a toll-gate without paying toll or to pass over a way clearly impassable, he is guilty of contributory negligence himself which will defeat a recovery although the driver may not have been his servant.<sup>2</sup>

Travelers, whether on foot or in carriages, have a right to stop a reasonable time by the roadside for their own convenience, provided they do not unduly interfere with the rights of others. Thus, hacks or omnibuses may stop to load or unload passengers, and where a traveler had stopped at the side of a street, leaving his wife to watch the horse, which became frightened at a Punch and Judy show and ran away, dragging the woman after him until she was obliged to let loose of the reins, it was held that the owner of another horse, into which the defendant's horse ran, could not recover for the injury.<sup>3</sup> So a traveler on foot may stop to tie his shoe or to get a drink at a hydrant or fountain without losing his rights as a traveler.<sup>4</sup> But this right to stop by the wayside must not be exercised in an unreasonable manner, so as to unduly interfere with the

<sup>1</sup> *Robinson v. N. Y., etc., R. R. Co.*, 66 N. Y. 11; *Hoag v. N. Y. Cent. R. R. Co.*, 111 N. Y. 199; *Masterson v. N. Y., etc., Co.*, 84 N. Y. 247; *Little v. Hackett*, 116 U. S. 366; *Nesbit v. Garner*, 75 Ia. 314, S. C. 9 Am. St. Rep. 486; *Town of Knightstown v. Musgrove*, 116 Ind. 121, S. C. 9 Am. St. Rep. 827; *Cuddy v. Horn*, 46 Mich. 596; *Battishill v. Humphery*, 64 Mich. 494; *Follam v. Mankato*, 35 Minn. 522; *Wabash, etc., R. R. Co. v. Shacklet*, 105 Ill. 364, S. C. 44 Am. Rep. 791; *Philadelphia, etc., R. R. Co. v. Hogeland*, 66 Md. 149; *St. R'y Co. v. Eadie*, 43 Ohio St. 91; *N. Y., etc., R. R. Co. v. Steinbrenner*, 47

*N. J. L.* 161, S. C. 54 Am. Rep. 126; *N. Y., etc., R. R. Co. v. Cooper (Va.)*, 37 Am. & Eng. R. R. Cas. 33; *Galveston, etc., R. R. Co. v. Kutac (Tex.)*, 37 Am. & Eng. R. R. Cas. 470.

<sup>2</sup> *Brannen v. Kokomo, etc., Gravel Road Co.*, 115 Ind. 115; *Tp. of Crescent v. Anderson*, 114 Pa. St. 643, S. C. 60 Am. Rep. 367.

<sup>3</sup> *Goodman v. Taylor*, 5 Carr. & P. 410. See, also, *Frazer v. Kimler*, 2 Hun. 514.

<sup>4</sup> *Murray v. McShane*, 52 Md. 217, S. C. 36 Am. Rep. 367; *Duffy v. Dubuque*, 63 Ia. 171, S. C. 50 Am. Rep. 743.

rights of other travelers. Thus, it is unlawful for coaches or omnibuses to congregate at the side of a street in a populous city so as to interfere with travel by remaining there an unreasonable time for the purpose of soliciting passengers;<sup>1</sup> and so, it is unlawful for a merchant to keep three or four large wagons constantly in the street in front of his premises in such a manner as to seriously interfere with the use of the street by the traveling public.<sup>2</sup> It has also been held contributory negligence, sufficient to prevent a recovery, to hitch a horse by the roadside in such a manner that the hind wheels of the carriage to which it is attached extend into the beaten track of the road.<sup>3</sup>

It is not unlawful to drive cattle along the road, but one who does so must use due care to avoid injury to others.<sup>4</sup> What is to be regarded as due care must depend largely upon the circumstances of the particular case. Greater precautions may be necessary where animals are driven along the streets of a populous city than where they are driven upon a country road.<sup>5</sup> If reasonable care is used in driving cattle along a highway, and, notwithstanding such care, they escape and go upon adjoining land which is unfenced, their owner is not liable therefor where he uses reasonable care and promptness in removing them.<sup>6</sup> But it is not lawful, in the absence of a statute, to turn cattle upon the highway to graze, and one who does so, or negligently permits them to escape from his own enclosure upon the land of another, will be liable to the latter in damages.<sup>7</sup>

<sup>1</sup> *Rex v. Cross*, 3 Campb. 226.

<sup>2</sup> *Rex v. Russell*, 6 East, 427; *People v. Cunningham*, 1 Denio, 524, S. C. 43 Am. Dec. 709.

<sup>3</sup> *Le Baron v. Joslin*, 41 Mich. 313; *Stiles v. Geesey*, 71 Pa. St. 439. We suppose, however, that such an act would not justify a traveler in purposely running into the carriage, if he saw it, and could, by the exercise of reasonable care at his command, pass by without a collision.

<sup>4</sup> *Ficken v. Jones*, 28 Cal. 618.

<sup>5</sup> See *Sullivan v. Scripture*, 3 Allen, 564; *Hudson v. Roberts*, 6 Exch. 697;

*Hewes v. McNamara*, 106 Mass. 281; *Michael v. Alestree*, 2 Lev. 172.

<sup>6</sup> *Hartford v. Brady*, 114 Mass. 466, S. C. 19 Am. Rep. 377; *Lyman v. Gipson*, 18 Pick. 422; *Cool v. Crommet*, 13 Me. 250; *Dovaston v. Payne*, 2 H. Bl. 528; *Goodwyne v. Chevely*, 28 L. J. Exch. 298; *Tillett v. Ward* (Q. B.), 22 Am. L. Reg. (N. S.) 245, and note.

<sup>7</sup> *Stackpole v. Healy*, 16 Mass. 33, S. C. 8 Am. Dec. 121; *Tonawanda R. R. Co. v. Munger*, 5 Denio, 255, S. C. 49 Am. Dec. 239, and note; *Mills v. Stark*, 4 N. H. 512, S. C. 17 Am. Dec. 444; *Dovaston v. Payne*, 2 H. Bl. 528.

The general rule that the owner of cattle is liable for personal injuries caused by them where they escape from his control while driving them upon the highway, where he is negligent in the management of them, but is not liable in the absence of negligence, is aptly illustrated by several recent decisions. Thus, where the plaintiff was injured by the defendant's bull, while it was being led through a public street, and it was proved that the defendant said, after the accident, that his servant was careless in his manner of leading the bull, the court held that this evidence, together with the knowledge imputable to the defendant of the dangerous nature of such an animal, justified the jury in returning a verdict against the defendant.<sup>1</sup> On the other hand, where a butcher bought an ox at market, and it became unmanageable while his drovers were driving it through a street, and, without any negligence on their part, rushed into a shop to the damage of the shop owner, the court held that the butcher was not liable.<sup>2</sup> It has, also, been held that it is not negligence *per se* to permit a boy fifteen years of age to drive a cow along a highway.<sup>3</sup>

Travelers are not confined to the use of horses and ordinary carriages upon highways. It is a matter of considerable difficulty to determine to just what extent they may avail themselves of new means of locomotion, and new motor-power, such as steam and electricity, but we suppose, in the absence of anything to the contrary, that new and improved means of locomotion must be deemed to have been contemplated when our highways were laid out or dedicated, provided they are such as do not unreasonably endanger or unduly interfere with travel upon foot or by horses in the ordinary manner. Whenever a new means of locomotion comes into general use among travelers upon highways, which is not dangerous when properly managed, and which does not unduly interfere with the proper use of the highway in other modes, we think it can not be deemed unlawful in itself. It has even been held that the use of a steam traction engine upon a highway is not necessarily a

<sup>1</sup> Linnehan v. Sampson, 126 Mass. 506, S. C. 30 Am. Rep. 692.

<sup>2</sup> Tillet v. Ward (Q. B.), 22 Am. L. Reg. (N. S.) 245.

<sup>3</sup> Smith v. Matteson, 41 Hun. 216.

nuisance or unlawful *per se*.<sup>1</sup> So it is said in a recent case: "It can not be doubted that the defendant had a right to transport his machinery over the highway, and, as was stated by way of illustration, any person has a right to transport, over the highway, elephants and animals which may frighten horses. So, also, loads of goods which, from their height or appearance, or the noise made in transport, might terrify some horses."<sup>2</sup> But one who undertakes to drive along a highway an object or animal which, from its appearance or noise, is calculated to frighten horses, should take proper precautions by having a sufficient number of persons in charge of it, or otherwise, to warn travelers and prevent injury.<sup>3</sup>

The invention of the bicycle has brought into use a new means of locomotion, which has already given rise to much litigation. There can be no doubt, we think, that a bicycle is a vehicle<sup>4</sup> of such a nature that it may be properly used upon our highways.<sup>5</sup> Being a vehicle, its proper place is upon the street or roadway, and not upon the sidewalk, especially where the statute expressly prohibits riding or driving upon sidewalks. Thus, it has been held, that one who rides a bicycle upon a sidewalk in violation of a statute against riding or driving upon sidewalks, in such a manner as to rudely and recklessly run against a pedestrian, is liable to a civil action for assault and battery, notwithstanding the absence of any express intention to cause injury to the plaintiff.<sup>6</sup> Bicycles are subject to the "law of the road,"<sup>7</sup> and their use upon highways may be regulated by the legislature.<sup>8</sup>

<sup>1</sup> *Macomber v. Nichols*, 34 Mich. 212, S. C. 22 Am. Rep. 522. See, also, *Wabash, etc., R. R. Co. v. Fraver*, 111 Ind. 195. Compare *North Chicago, etc., R'y Co. v. Lake View*, 105 Ill. 207, S. C. 2 Am. and Eng. Corp. Cas. 6.

<sup>2</sup> *Bennett v. Lovell*, 12 R. I. 166, S. C. 34 Am. Rep. 628.

<sup>3</sup> *Bennett v. Lovell*, *supra*. See, also, *Linnehan v. Sampson*, 126 Mass. 506, S. C. 30 Am. Rep. 692.

<sup>4</sup> *Mercer v. Corbin*, 117 Ind. 450; *State v. Collins* (R. I.), 17 Atl. Rep. 131; *Taylor v. Goodwin*, L. R. 4 Q. B. Div. 228.

<sup>5</sup> *Holland v. Bartch*, 120 Ind. 46. Compare, however, *State v. Yopp*, 97 N. Car. 477, S. C. 2 Am. St. Rep. 305.

<sup>6</sup> *Mercer v. Corbin*, 117 Ind. 450.

<sup>7</sup> *State v. Collins*, 17 Atl. Rep. 131.

<sup>8</sup> *State v. Yopp*, 97 N. Car. 477, S. C. 2 Am. St. Rep. 305.



## CHAPTER XXXII.

### CONCERNING PROCEDURE AND DAMAGES IN ACTIONS FOR PERSONAL INJURIES.

It is in the main true that the rules of procedure and of evidence, as well as the rules which fix the measure of damages, are substantially the same in actions against public corporations for injuries caused by defective roads and streets as in other actions brought to recover damages for injuries caused by a negligent breach of duty, but, nevertheless, while this is true, it is also true that upon some points the rules are peculiar, or, as it may, perhaps, be more accurate to say, the rules are applied in a mode which differs somewhat from that pursued in ordinary cases wherein damages are sought for injuries caused by negligence. It seems appropriate, therefore, to consider these matters, and this we have done in outline rather than in detail. But there is an additional reason which has influenced us to treat of such matters, and that reason is, it enables us to gather up and present with something more of clearness than could otherwise be done, matters of practical importance.

The right to recover in cases of negligence rests upon a breach of a legal duty, and where there is no duty there is no cause of action. It is, therefore, incumbent upon the plaintiff to make it appear that there was a legal duty. This general doctrine is illustrated in many cases.<sup>1</sup> But it is not necessary,

<sup>1</sup> *Michigan Central R. R. Co. v. Coleman*, 28 Mich. 440; *Tourtellot v. Rosebrook*, 11 Metc. 460, 463; *Fuller v. Citizens' National Bank*, 15 Fed. R. 875; *Oyshterbank v. Gardiner*, 17 Jones & S. 263; *Columbus, etc., Co. v. Troesch*, 68 Ill. 545; *Norfolk, etc., Co. v. Ferguson*, 79 Va. 241; *Frech v. Philadelphia*, 39 Md. 574; *Schultz v. Pacific R. R. Co.*, 26 Mo. 13; *Button v. Frink*, 51 Conn.

342. Public corporations are liable only to one to whom they owe a duty, and to such a person only when the act which caused the injury is within the scope of the duty owing him. It must always appear that there was a duty that the injured person had a right to have performed. *City of Anderson v. East*, 117 Ind. 126, S. C. 10 Am St. R. 35. Dr. Wharton says that: "A

in order to establish the legal duty, to do more than prove the facts out of which the duty springs, for where the facts are established the law will fix the duty. The duty is created by the law but the facts must exist in order to give force or relevancy to the legal principles. In order to establish negligence it must be shown that the corporation did what it ought not to have done, or omitted something that it was its duty to do.

It is not enough to entitle a plaintiff to recover that it is made to appear that there was a negligent breach of duty on the part of the public corporation and that the plaintiff was injured by that breach of duty; more than this must be made to appear in

duty, however, not imposed specifically on a corporation can not be constructively attached so as to make its neglect the subject of a suit." Law of Negligence, section 257. For suggestions and rules in reference to declarations and complaints in actions for personal injuries growing out of a breach of duty respecting highways, the cases which follow may be consulted. Complaint for injury caused by defective sidewalk: *Urquhardt v. City of Ogdensburg*, 23 Hun. 75; *DeWitt v. City of Fort Wayne*, 47 Ind. 391; *Hardy v. Keene*, 52 N. H. 370; *Barney v. Hartford*, 73 Wis. 95, S. C. 40 N. W. R. 581; *Alexander v. Big Rapids (Mich.)*, 43 N. W. R. 1071. Complaint for injuries caused by defects and obstructions in roadways: *Austin v. Ritz (Tex.)*, 9 S. W. R. 884; *City of Lafayette v. Weaver*, 92 Ind. 477; *City of Washington v. Small*, 86 Ind. 462; *City of Madison v. Baker*, 103 Ind. 41; *Town of Rushville v. Poe*, 6 Ind. 83; *Turner v. City of Indianapolis*, 96 Ind. 51; *Street R. R. Co. v. Nolthenius*, 40 Ohio St. 376; *Clayards v. Dethrick*, 12 Q. B. 439. Declaration for obstructing a street by a wagon: *Rounds v. Corporation, etc.*, 25 U. C. C. P. 123. See *Lynch v. Nurdin*, 1 Q. B. 29. Declaration for injuries caused by a negligent driver:

*Cotton v. Wood*, 8 C. B. (N. S.) 568; *Mitchell v. Crassweller*, 13 C. B. 237; *Pendleton, etc., Co. v. Shires*, 18 Ohio St. 255; *Kessler v. Leeds*, 51 Ind. 212. Complaints against turnpike companies: *Jonesboro, etc., Co. v. Baldwin*, 57 Ind. 86; *Wilson v. Trafalgar, etc., Co.*, 83 Ind. 326. Declarations and complaints for injuries from excavations: *Mitchell v. Harper*, 4 U. C. C. P. 147; *Barnes v. Ward*, 9 C. B. 392; *Goldthorpe v. Hardman*, 13 M. & S. 377; *Kinney v. Morley*, 2 U. C. C. P. 226. Complaint for collecting water and casting it on private property: *Davis v. City of Crawfordsville*, 119 Ind. 1, S. C. 21 N. E. R. 449. Complaint for injuries caused by defective bridges: *Dale v. Webster County*, 76 Ia. 370, S. C. 41 N. W. 1; *Harris v. Board of Comm'rs (Ind.)*, 23 N. E. R. 92; *Alabama, etc., Co. v. Georgia, etc., Co. (Ala.)*, 6 So. 73. Statement of the injury: *Ehrgott v. New York*, 96 N. Y. 264. Allegation of the presentment of claim: *Wentworth v. Summit*, 60 Wis. 28; *Reming v. Buffalo*, 102 N. Y. 308. Many of the cases to which we have referred contain much that is valuable upon the questions of the duty and liability, and upon questions of evidence as well as upon questions of pleading.

order to entitle the plaintiff to a recovery, for it must also be shown that the duty violated was one owing to the plaintiff at the time the injury occurred and at the place where it was received. A municipal corporation may be held liable for a negligent breach of duty to one person and yet not liable to others. It is true that where an injury is received by a traveler in lawful use of a road or street there is a right of action, although the duty violated by negligently failing to make the public way safe is a public one, but in such cases the traveler has a right to have the duty performed and he sustains a special injury from its negligent breach. In such cases there is seldom any serious difficulty in ascertaining the nature of the duty, but where the traveler leaves the line of the way there is sometimes difficulty in determining how far the corporate duty extends. It is, in all cases, incumbent upon the plaintiff who leaves a public way to show; either by direct or circumstantial evidence, that he received his injury because the municipal corporation was guilty of a breach of duty which it was his right to have performed for his safety and protection. He may be able to show that the corporation was guilty of negligence and that its wrong was such as would make it liable, and yet such a showing will be of no avail to him if the duty was not one which he had a right to have performed. Thus, if a plaintiff goes into an inclosure, where he was neither expressly nor impliedly invited to go, and there receives an injury he can not recover, although his injury was caused by the negligence of the municipal corporation in omitting to guard a dangerous place in a sewer which it had constructed.<sup>1</sup>

The plaintiff in an action based upon the neglect of a public corporation to keep its streets safe for passage can not successfully ask that negligence shall be presumed; on the contrary, the reasonable presumption is that the local officers have done their duty. In a case against private corporations, it would be

<sup>1</sup> *Murphy v. City of Brooklyn* (N. Y.), 23 N. E. R. 887. In the case cited it was held that, although the sewer might be deemed a nuisance as to the owner of the property on which it was located, still, the plaintiff had no cause of action for the reason that, as to him, there was no duty, and, as there was no duty, there was no actionable wrong. See *Beck v. Carter*, 68 N. Y. 283; *Murphy, Jr., v. City of Brooklyn*, 98 N. Y. 642.

a violent presumption to assume that they were negligent,<sup>1</sup> and to indulge such a presumption against public officers having no private interests to subserve would be much more unreasonable. There is substantial harmony in the judicial expressions upon this subject even as to purely private corporations and individuals.<sup>2</sup>

But the rule forbidding a presumption of negligence is not to be confounded with the rule which declares that negligence may be inferred from facts and circumstances, for the rules are separate and distinct, and, when properly understood, there is no conflict between them, although, in giving them practical application, confusion has resulted from a failure to justly discriminate between cases of different classes. It is firmly established that negligence may be inferred from circumstances,<sup>3</sup> and this is but a just construction and application of the long established rule which finds its strongest illustration in those cases

<sup>1</sup>Public policy, however, requires that there should be exceptions to this general rule, as, for instance, in the case of common carriers.

<sup>2</sup>*Toomey v. London, etc., Co.*, 3 C. B. N. S. 146; *Jackson v. Hyde*, 28 U. C. Q. B. 294; *Harris v. Perry*, 89 N. Y. 308; *Singleton v. Eastern Counties R. R.*, 7 C. B. N. S. 287; *Duffy v. Upton*, 113 Mass. 544; *Ward v. Andrews*, 3 Mo. App. 275; *Strouse v. Whittlesly*, 41 Conn. 559; *Higgs v. Maynard*, 1 Harr. & R. 581; *Hammack v. White*, 11 C. B. (N. S.) 588; *Kendall v. City of Boston*, 118 Mass. 234; *Flynn v. Beebee*, 98 Mass. 575; *Goshorn v. Smith*, 92 Pa. St. 435; *Philadelphia, etc., Co. v. Hummell*, 44 Pa. St. 375. In the case last cited it was said: "But negligence is not to be found without evidence." *Stock v. Wood*, 136 Mass. 353, supplies an excellent illustration of the rule.

<sup>3</sup>*Thomas v. Western, etc., Co.*, 100 Mass. 156; *Durant v. Palmer*, 5 Dutch, 544; *Mullen v. St. John*, 57 N. Y. 567; *Kearney v. London, etc., Co.*, L. R. 6

Q. B. 759; *Briggs v. Oliver*, 4 H. and C. 403; *Devlin v. Gallagher*, 6 Daly, 494; *Weitner v. Delaware, etc., Co.*, 4 Robb. 234; *Warren v. Kauffman*, 2 Phila. 259; *Feltham v. England*, L. R. 2 Q. B. 33; *Cleveland v. Spier*, 16 C. B. N. S. 399; *Sherwood v. City of Hamilton*, 37 U. C. Q. B. 410; *City of Sterling v. Thomas*, 60 Ill. 264; *Stratton v. Staples*, 59 Me. 94; *Terre Haute, etc., Co. v. Buck*, 96 Ind. 346; *City of Chicago v. Major*, 18 Ill. 349; *Lehman v. City of Brooklyn*, 29 Barb. 234; *Costello v. Landwehr*, 28 Wis. 522; *Cassidy v. Angell*, 12 R. I. 447. A clear and accurate statement of the rule is that of the court in *Hart v. Hudson River, etc., Co.*, 80 N. Y. 622, where it was said: "But it needs not that this be done by the positive and direct evidence of the negligence of the defendant. The proof may be indirect, and the evidence had by showing circumstances from which the inference is barely drawn that these principal and essential facts existed."

in which guilt of the gravest crimes may be inferred from circumstantial evidence.

The place where the injury occurred is sometimes an important matter for consideration, especially is it so upon the question of notice, for what would be negligence respecting a street in a densely populated and much frequented part of a city or incorporated town might not be so in a remote and little used street or alley.<sup>1</sup> In most cases the question of whether the corporation ought to have acquired knowledge is dependent upon the locality and its surroundings, and is generally a question of fact for the jury. It is, therefore, proper to place before them the facts concerning the locality, whether it was much frequented, whether it was such as ordinary prudence required should be often inspected or looked after and like matters. So, too, it is competent for the defense to show that barriers, lights or other warnings and guards were placed about the dangerous place and that they were subsequently removed by a stranger or a wrong-doer.<sup>2</sup> It is competent, also, to show that the defect was one not open to discovery by persons using ordinary care, and upon this point it is competent to prove that persons habitually using the street had not observed it,<sup>3</sup> but it can not be shown that others passed the place in safety.<sup>4</sup> It is also proper to show that the place was so well lighted at all hours of the night that there was no need of barriers or other guards. So, too, upon the principle stated at another place,<sup>5</sup> it is proper to show that the corporation had neither the funds required to make repairs or remove obstructions nor the means of obtaining them.

While there is, as we have said, much conflict upon the question as to who has the burden of proving contributory negligence, there is little upon the question of the effect of contributory negligence when it is proved. The weight of authority is overwhelmingly in favor of the doctrine that contributory negligence will effectually defeat a recovery. It is, therefore, competent in all cases for the corporation to introduce

<sup>1</sup> Reed v. Mayor, 31 Hun. 311.

<sup>4</sup> Temperance Hall v. Giles, 33 N. J.

<sup>2</sup> Mullen v. Rutland, 55 Vt. 77; Klatt v. Milwaukee, 53 Wis. 196.

L. 260; Bauer v. City of Indianapolis, 99 Ind. 56.

<sup>3</sup> Broburg v. Des Moines, 63 Ia. 523.

<sup>5</sup> See *Ante*, p. 508.

evidence tending to show that the fault of the plaintiff proximately contributed to his injury. It is not enough, however, to show fault; it must also be shown that it proximately contributed to the injury.<sup>1</sup> Circumstances<sup>2</sup> indicative of a want of ordinary care are always admissible in evidence when at all material to the issue joined. It is competent to show that the street was so well lighted that it was carelessness on the part of the plaintiff not to have observed the defect or obstruction,<sup>3</sup> but the absence of lights, although there is no duty resting on the municipality to light its streets, may tend to prove that the plaintiff was not guilty of contributory negligence.<sup>4</sup> Knowledge of the existence of the defect or obstruction is, as we have elsewhere shown,<sup>5</sup> an important factor in cases where the fault of the plaintiff is an essential element of the case. An unnecessary deviation from the traveled way may sometimes constitute such contributory negligence as will bar a recovery, but this is by no means always true, and the question whether the traveler

<sup>1</sup> *Nave v. Flack*, 90 Ind. 205. Judge Cooley says: "The negligence that will defeat a recovery must be such as proximately contributed to the injury." Cooley on Torts (1st ed.), 679. See, also, Beach on Contributory Negligence, Chapter II. Mr. Beach collects a great number of cases illustrative of the general rule, and exhibits many shades and phases of the subject.

<sup>2</sup> As in the cases of negligence on the part of the defendant so in cases of negligence on the part of the plaintiff, circumstances without direct evidence may warrant the inference that the plaintiff was guilty of negligence. A strong array of authority may be mustered in favor of the doctrine that due care may be presumed from the instinct of self-preservation and the love of life. *Allen v. Willard*, 57 Pa. St. 374; *Northern Central R. R. Co. v. State*, 31 Md. 357; *Thomas v. Delaware, etc., Co.*, 8 Fed. R. 731; *Cassidy v. Angell*, 12 R. I. 447; *Central Branch, etc., Co. v. Pate*, 21 Kan. 539; *Blewett v. Wyandotte, etc.*,

*Co.*, 72 Mo. 583. But courts must take notice of that which is matter of ordinary experience, and it is undeniably true that men are often careless and reckless of their own safety. *Gaynor v. Old Colony, etc., Co.*, 100 Mass. 208. It is probably true that it is proper to argue to the jury that the instinct of self-preservation leads men to avoid exposure to danger and that it is an element to be considered as tending to show that there was no contributory negligence, but it can hardly be correct to say, as matter of law, that it proves that there was not contributory fault. *Cordell v. New York, etc., Co.*, 75 N. Y. 330; *Warner v. New York, etc., Co.*, 44 N. Y. 465.

<sup>3</sup> *Moore v. Richmond (Va.)*, 8 S. E. R. 387; *King v. Thompson*, 87 Pa. St. 365.

<sup>4</sup> *Ante*, p. 458.

<sup>5</sup> *Ante*, p. 472; *Kelly v. Doody (N. Y.)*, 22 N. E. R. 1084. See, also, Beach on Contributory Negligence, 257.

in deviating from the way was guilty of negligence must, in almost every instance, be a question of fact for the jury,<sup>1</sup> for there are many things that will excuse one who leaves the traveled way. If the street is so laid out, improved, or maintained as to mislead the traveler, then, the fault is that of the corporation and not of the traveler. It is true, as a general rule, that as the corporation is responsible only for the condition of the public way and not for the condition of adjoining land, it is the fault of the traveler if he quits the way,<sup>2</sup> but there are many exceptions to the rule.<sup>3</sup> It is safe to affirm that where a traveler leaves the usually traveled way and is not misled by the wrong of the corporation he is bound to show a sufficient excuse or suffer defeat, but, generally, what is a sufficient excuse is a question for the jury. Contributory negligence may often be inferred from the fact that a traveler leaves a safe part of the way and attempts to traverse a dangerous part where there is no reasonable excuse or cause for doing so. While it is true that,

<sup>1</sup> *Ramsey v. Rushville*, 81 Ind. 394.

<sup>2</sup> *City of Scranton v. Hill*, 102 Fa. St. 378, S. C. 48 Am. R. 211; *Zettler v. Atlanta*, 66 Ga. 195; *Larrabee v. Peabody*, 128 Mass. 561; *Arey v. Newton*, 148 Mass. 598, S. C. 20 N. E. R. 327; *Leslie v. Lewiston*, 62 Me. 468; *Drew v. Sutton*, 55 Vt. 586, S. C. 45 Am. R. 645.

<sup>3</sup> *Erie v. Schwingle*, 22 Pa. St. 384; *Briggs v. Guilford*, 8 Vt. 264.

<sup>4</sup> *Carolus v. New York*, 6 Bosw. 15; *Quincy v. Barker*, 81 Ill. 300; *Parkhill v. Brighton*, 61 Ia. 103; *Momence v. Kendall*, 14 Ill. App. 229; *Erie v. Magill*, 101 Pa. St. 616; *Fleming v. Lockhaven (Pa.)*, 6 Weekly Notes of Cases, 216; *Lovenguth v. Bloomington*, 71 Ill. 238; *Chicago v. Bixby*, 84 Ill. 82; *Vicksburg v. Hennessey*, 54 Miss. 391; *Monmouth v. Sullivan*, 8 Ill. App. 50; *McLauy v. McGregor*, 54 Ia. 717. See, also, upon the general subject, *Griffin v. New York*, 9 N. Y. 456; *Schaeffer v. Sandusky*, 33 Ohio St. 246; *Burker v. Covington*, 69 Ind. 33. Among the

circumstances which may be given in evidence upon the question of the plaintiff's contributory negligence is that of his own intoxication. *Alger v. Lowell*, 3 Allen, 402. This is, however, a mere circumstance to be considered, for negligence can not be inferred from the fact that the plaintiff was intoxicated. *Healy v. New York*, 3 Hun. 708. Nor is a drunken man beyond the protection of the law. *Cincinnati, etc., R. R. Co. v. Cooper (Ind.)*, 22 N. E. R. 340. The plaintiff's intoxication is no excuse for his own negligence. *Illinois Central R. R. Co. v. Hutchinson*, 47 Ill. 408. Connected with other circumstances the plaintiff's intoxication may exert a controlling influence. *Wood v. Andes*, 11 Hun. 543. If his intoxication were such as to deprive him of the power of exercising due care and the injury is attributable to that fact, it is plain enough that there can be no recovery. *Illinois Central R. R. Co. v. Cragin*, 71 Ill. 177; *Cramer v. Burlington*, 42 Ia. 315; *Monk v. New Utrecht*, 104 N. Y.

ordinarily, travelers are not to be adjudged guilty of contributory negligence for choosing for themselves the part of the way they will use, still, where there is danger which reasonable care and attention would avoid, they are in fault if they omit to exercise such care and attention and heedlessly go upon the dangerous part.

The burden of proof is generally upon the plaintiff to show that the place where he was injured is a highway,<sup>1</sup> that the defect existed, that it caused his injury,<sup>2</sup> that the defendant was negligent or in fault for not repairing it,<sup>3</sup> and, in many jurisdictions, that he was himself free from contributory negligence.<sup>4</sup> Where notice of the claim is made a pre-requisite to an action against the city, it also must be shown.<sup>5</sup>

For the purpose of showing the existence of the defect, it is competent to prove the condition of the place, where it has re-

561. We can see no reason why it may not be inferred, in a case where there is evidence tending to show that a sober man might have safely used the public way, that the injury was caused by the inability of a man shown to be drunk to use due care.

<sup>1</sup> 2 Shearm. & Redf. on Neg., section 382. This is essential because the liability springs from the duty to exercise reasonable care to keep the highway in a safe condition for travel. It is, indeed, the chief support of the right of action. But, as appears from what has been said, it is not necessary to prove that the highway was regularly established in due form of law; it is enough to prove that it has been treated as a highway and that travel upon it has been expressly or impliedly invited.

<sup>2</sup> *Lester v. Pittsford*, 7 Vt. 158; *Pennsylvania Co. v. Hensil*, 70 Ind. 569; *Philadelphia, etc., Co. v. Boyer*, 97 Pa. St. 91. But the evidence upon this point need not be direct, for it is sufficient if there are circumstances from which the requisite conclusion may be legitimately inferred.

<sup>3</sup> The mere happening of an accident

is not ordinarily sufficient proof of negligence. *Beatty v. Gilmore*, 16 Pa. St. 463; *Hale v. Smith*, 78 N. Y. 480; *Baltimore Elevator Co. v. Neal*, 5 Atl. R. 338; *Wabash, etc., R. R. Co. v. Locke*, 112 Ind. 404, S. C. 2 Am. St. Rep. 193. For definition of word "accident," see *Nave v. Flack*, 90 Ind. 205-210; *Browne Judicial Inter.*, 4.

<sup>4</sup> Upon this question there is a wide diversity of opinion. See *City of Lincoln v. Walker*, 5 Eng. & Am. Corp. Cas. 615, where the cases are collected and the States are arranged in alphabetical order.

<sup>5</sup> *Wentworth v. Summitt*, 60 Wis. 281; *Dorsey v. Racine*, 60 Wis. 292; *Reining v. Buffalo*, 102 N. Y. 308, overruling *Nagel v. Buffalo*, 34 Hun. 1. It was held in *May v. City of Boston*, 23 N. E. R. 220, that the fact that the plaintiff was ill, and for part of the time under the influence of opiates, was not sufficient to excuse the failure to give notice. The court cited *McNulty v. City of Cambridge*, 130 Mass. 275; *Lions v. Cambridge*, 132 Mass. 524; *Mitchell v. City of Worcester*, 129 Mass. 525.



mained unchanged, for several days before or after the accident.<sup>1</sup> But evidence that other sidewalks in the neighborhood were out of repair is generally inadmissible.<sup>2</sup> The plaintiff has a right to prove all relevant and material circumstances attending the accident<sup>3</sup> as well as such declarations of the parties at the time as form part of the *res gestæ*,<sup>4</sup> but declarations of the injured person not forming part of the *res gestæ*, and not coming within the rule allowing proof of statements indicative of pain, are not competent.<sup>5</sup> Whatever is so connected with the act, event or transaction as to form part of it is competent, but self-serving declarations made subsequently are not admissible in evidence, so that the test of competency is supplied by ascertaining whether the declarations are so blended and interwoven with the act, event or transaction as to be a part of it.

Where the defect which caused the injury is attributable to the act of the public corporation itself, then, as we have seen, it is not incumbent upon the plaintiff to prove notice, but even this rule has an exception, apparent rather than real, for, where the defect is a latent one, the municipality is not liable, unless

<sup>1</sup> *City of Chicago v. Dalle*, 115 Ill. 386; *Berrenberg v. Boston*, 137 Mass. 231; *De Forest v. Utica*, 69 N. Y. 614; *Abilene v. Hendricks* (Kan.), 13 Pac. R. 121; *City of Indianapolis v. Scott*, 72 Ind. 196.

<sup>2</sup> *Ruggles v. Nevada*, 63 Ia. 185. Compare *Cox v. Westchester Turnp. Co.*, 33 Barb. 414.

<sup>3</sup> *Hallahan v. N. Y., etc., R. R. Co.*, 102 N. Y. 194.

<sup>4</sup> *Lund v. Inhabitants*, 9 Cush. 36; *Frink v. Coe*, 4 Greene (Ia.), 555; *Brownell v. Pacific R. R. Co.*, 47 Mo. 239; *Stockman v. Terre Haute, etc., Co.*, 15 Mo. App. 503; *Harriman v. Stone*, 57 Mo. 93; *Casey v. New York, etc., Co.*, 78 N. Y. 518; *Baker v. Gausin*, 76 Ind. 371; *Leahy v. Cass Ave., etc., Co.*, 97 Mo. 165, S. C. 10 S. W. R. 58; *Chicago, etc., v. Becker* (Ill.), 21 N. E. R. 524; *Augusta, etc., Co. v.*

*Randall*, 79 Ga. 304, S. C. 4 S. E. R. 474.

<sup>5</sup> *Martin v. N. Y., etc., R. R. Co.*, 103 N. Y. 626; *Waedele v. New York, etc., Co.*, 95 N. Y. 274. The rule that declarations made after the occurrence are not competent is a familiar one, and the chief difficulty lies in applying it. The cause of this difficulty springs from the fact that the line which separates acts forming part of the thing done and those which take place after it has been done is not always easily traced. It may be said, however, that if the act has been fully performed, or the event has fully passed, then self-serving declarations are not competent, no matter how brief the interval of time; if the act has not been performed or the event has not passed, then the declarations may be admissible, although the transaction or act covers a considerable period of time.

there is evidence charging it with notice.<sup>1</sup> There is, obviously, an important distinction between concealed defects such as ordinary care would not reveal and defects open to discovery by the exercise of ordinary care. But the rule protecting municipal corporations from liability for latent defects, where knowledge is not brought home to them, does not protect them where ordinary care would have revealed the defect, nor does it protect them where reasonable care and skill would have enabled them to foresee and provide against injury from the defect.<sup>2</sup> This rule requires them to exercise ordinary care and diligence to provide against the decay and weakening of timber from age or the action of the elements.<sup>3</sup>

The authorities recognize two kinds of notice, actual and constructive, and notice imparted by the nature of the work itself, or given to some officer of the municipality,<sup>4</sup> may be considered as actual notice, while notice inferred from lapse of time or other circumstances may be considered as constructive notice.<sup>5</sup> Constructive notice is generally proved by showing the existence of the defect for such a length of time as to cre-

<sup>1</sup> *Joliet v. Walker*, 7 Ill. App. 267; *Scanlon v. New York*, 12 Daly, 81; *Hunt v. New York*, 52 Sup. Ct. 198; *Hart v. Brooklyn*, 36 Barb. 226; *Hanscom v. Boston*, 141 Mass. 242. In the case last cited it was said: "We think the defect must be one which the proper officers either had knowledge, or, by the exercise of reasonable care and diligence, might have knowledge of in time to have remedied it, or to have prevented the injury complained of." The court cited as supporting its ruling, *Lyman v. Hampshire*, 140 Mass. 311; *Purple v. Greenfield*, 138 Mass. 1; *Rooney v. Randolph*, 128 Mass. 580; *Harriman v. Boston*, 114 Mass. 241.

<sup>2</sup> *Cusick v. Norwich*, 40 Conn. 375; *Kunz v. Troy*, 104 N. Y. 344; *Market v. St. Louis*, 56 Mo. 189; *Weed v. Ballston*, 76 N. Y. 329; *Gubasko v. New York*, 12 Daly, 182; *Boucher v. New Haven*, 40 Conn. 456.

<sup>3</sup> *City of Indianapolis v. Scott*, 72

Ind. 196; *Rapho v. Moore*, 68 Pa. St. 404; *Furnell v. St. Paul*, 20 Minn. 117.

<sup>4</sup> We have already considered the question of notice to city officers, and we need here do no more than to call attention to what was there said and to cite additional cases. *Ante*, 461, 463. *Salina v. Trosper*, 27 Kan. 544; *Monies v. Lynn*, 119 Mass. 273; *Foster v. Boston*, 127 Mass. 290; *Rogers v. Shirley*, 74 Me. 144; *Risson v. Bettel*, 30 Wis. 614; *Welch v. Portland*, 77 Me. 384. Notice to a citizen is not notice to the corporation. *Donaldson v. Boston*, 16 Gray, 508. *Contra*, *Springer v. Bowdoinham*, 7 Greenl. 442.

<sup>5</sup> *Requa v. Rochester*, 45 N. Y. 129; *Doveny v. Elmira*, 51 N. Y. 506; *Todd v. Troy*, 61 N. Y. 506; *Albritton v. Huntsville*, 60 Ala. 486; *Board of Commissioners v. Dombke*, 94 Ind. 72; *Dotton v. Common Council*, 50 Mich. 129; *Chicago v. Dalle*, 115 Ill. 386; *Chicago v. Fowler*, 60 Ill. 322.

ate the inference that it could not have so long existed unprotected or unremedied without negligence on the part of the municipal officers, but we suppose time is not universally the controlling element, for the character of the defect, its location and surroundings must often exert an important influence upon the question.

For the purpose of proving actual notice, it is competent to show an entry in a book of the corporation containing information of the condition of the street,<sup>1</sup> and it is also proper to give in evidence for the same purpose the report of the street commissioner.<sup>2</sup> Evidence contained in a resolution directing repairs to be made is also competent upon the question of notice.<sup>3</sup>

We have heretofore considered the question of the competency of evidence that other persons have received injury at the same place where the plaintiff was injured and from the same defect, and it is not necessary to do more at this place than suggest that, while the weight of authority sustains the doctrine that such evidence is admissible, still it is only admissible upon the question of notice. It is evident from the reasoning of the courts upon the subject that such evidence is to be limited strictly to the question of notice,<sup>4</sup> and it has been expressly held, and correctly so, as we think, that it will not authorize the inference that the defect or obstruction was of such a

<sup>1</sup>Blake v. Lowell, 143 Mass. 296.

<sup>2</sup>Bond v. Biddeford, 75 Me. 538.

<sup>3</sup>Erd v. St. Paul, 22 Minn. 443; Aurora v. Pennington, 92 Ill. 564. In City of Delphi v. Lowery, 74 Ind. 520, 526, it was held that a report of a committee was competent evidence, denying the doctrine of Dudley v. Inhabitants, 1 Metc. 477, and Collins v. Dorchester, 6 Cush. 396, and asserting that the decisions in those cases was in conflict with Crosby v. Boston, 118 Mass. 71, and the cases of Requa v. City of Rochester, 45 N. Y. 129, 137, City of Chicago v. Powers, 42 Ill. 169, Thornton v. Campton, 18 N. H. 20, Monghan v. School District, 38 Wis. 10. See Erd v. City of St. Paul, *supra*.

<sup>4</sup>Augusta v. Hafers, 61 Ga. 48; Kent v. Lincoln, 32 Vt. 591; Darling v. Westmoreland, 52 N. H. 401; Smith v. Sherwood, 62 Mich. 159; Quinlan v. Utica, 74 N. Y. 603; Nave v. Flack, 90 Ind. 205, 214; Hill v. Portland R. R. Co., 55 Me. 438. These cases all declare that the evidence is competent because it tends to show notice, but none of them hold that it is competent upon the question whether the defect was such as it was negligence on the part of the municipality not to provide against. In O'Hagan v. Dillon, 76 N. Y. 170, the court excluded evidence of the character here under mention, but there was no issue of notice for the action was against the author of the wrong.

character as to render the municipality liable.<sup>1</sup> This ruling is unquestionably right, for the fact that other persons than the plaintiff got hurt at a particular place does not tend to prove that the defect was of such a dangerous character as to make it negligence on the part of the municipal officers not to take measures to remedy it, nor can a collateral issue be so framed as to require an investigation in detail of why, or how, such persons were injured.

The consideration of the question whether evidence of repairs made after the injury was received is competent as tending to prove negligence takes us into a field of stubborn contest, for upon this question the authorities are in conflict, but the weight of authority is decidedly against the competency of such evidence.<sup>2</sup> Reasoning on principle it is quite difficult to reach a conclusion that evidence of subsequent repairs is admissible, for the only theory upon which it can with the slightest shade of plausibility be asserted that the evidence is com-

<sup>1</sup> *Dubois v. Kingston*, 102 N. Y. 219. It was said in the case cited that: "The fact that other persons had been injured by falling over the stone does not, of itself, establish that it was improperly placed in the location occupied, or that it was necessarily of such a dangerous character as to require the interposition of the city authorities to remove it. Such an accident might well take place in reference to any necessary structure connected with a sidewalk or a building thereon which might possibly interfere with persons using the same."

<sup>2</sup> The competency of the evidence is denied in these cases: *Hodges v. Percival* (Ill.), 23 N. E. Rep. 423; *Terre Haute, etc., R. R. Co. v. Clem* (Ind.), 23 N. E. R. 965; *Ely v. Railroad Co.*, 77 Mo. 34; *Nalley v. Hartford, etc., Co.*, 51 Conn. 524; *Morse v. Minneapolis, etc., Co.*, 30 Minn. 465, disapproving the earlier cases of *O'Leary v. City of Mankato*, 21 Minn. 65; *Phelps v. City of Mankato*, 23 Minn. 276; *Kelly v. Southern, etc., Co.*, 28 Minn. 98;

*Cramer v. City of Burlington*, 45 Ia. 627; *Hudson v. Chicago, etc., Co.*, 59 Ia. 581; *Couch v. Watson, etc., Co.*, 46 Ia. 17; *Dale v. Delaware, etc., Co.*, 73 N. Y. 468; *Kansas, etc., Co. v. Miller*, 2 Col. 442; *Fulton, etc., Co. v. Township of Kimball*, 52 Mich. 146; *Dougan v. Champlain Co.*, 56 N. Y. 1; *Baird v. Daily*, 68 N. Y. 547; *King v. New York, etc., Co.*, 4 Hun. 769; *Salters v. Canal Co.*, 3 Hun. 338. Affirming the competency of such evidence are these cases: *Penna. Co. v. Henderson*, 51 Pa. St. 315; *Westchester Co. v. McElwee*, 67 Pa. St. 311; *McKee v. Bidwell*, 74 Pa. St. 218; *Martin v. Towle*, 59 N. H. 31; *Galveston v. Evansich*, 63 Tex. 54. In the case of *City of Goshen v. England*, 119 Ind. 368, a single expression favors the doctrine declared in the cases last cited, but it is evident that the point was not considered, and that the statement can not be considered as authoritative. *Terre Haute, etc., v. Clem*, *supra*.

petent is, that it is a constructive or implied admission that there was prior negligence, but it is not just to assume that, because a duty is performed after the acquisition of new information, therefore the corporation performing it impliedly admits that it was antecedently negligent. We can not believe that an admission of antecedent negligence can be tortured from a performance of a duty after the happening of an accident that demonstrates, or makes known, the precedent danger. If repairing a defective way after an accident has occurred is to be construed as an admission, a penalty is imposed for the performance of what then becomes a duty, but which may not have previously existed as a duty, for to construe performance into an admission is to impose a penalty. The law is a practical science and its object is to secure justice by expedient and practical means, and, certainly, it is neither wise nor expedient to lay down a rule that will induce persons to remain inactive because action may be held to be an admission of a breach of duty. Such a rule as applied to railroad companies would, as one may see at a glance, work great harm, since it would tend to restrain them from improving or repairing cars or tracks—and the rule must be the same for all litigants—lest such an act be construed into an admission of prior negligence. The rule we disapprove violates the familiar principle that a new element can not be introduced into a case,<sup>1</sup> and the violation is a flagrant one, since it would lead into a wide and almost endless collateral investigation.<sup>2</sup> Another forcible objection to that rule is that it ignores the changed condition of affairs, disregards the knowledge acquired subsequent to the accident, and denies the corporation the benefit of the light shed by experience. This phase of the question is presented in a masterly opinion by the Supreme Court of Minnesota, wherein it is said: “A person may have exercised all the care which the law required,

<sup>1</sup> *Kansas, etc., Co. v. Miller*, 2 Col. 442; *Donnelly v. Fitch*, 136 Mass. 558.

<sup>2</sup> In the case of *Lane v. Atlantic Works*, 111 Mass. 136, it was said: “The test is to be found in the probable injurious consequences which were to be anticipated, not in the number of

subsequent events and agencies which might arise.” See, generally, *Wabash, St. Louis, etc., Co. v. Locke*, 112 Ind. 404; *Lewis v. Flint, etc., Co.*, 54 Mich. 55; *Sjogren v. Hall*, 53 Mich. 274; *Lofthus v. Union Ferry Co.*, 84 N. Y. 455, S. C. 38 Am. R. 533.

and yet, in the light of his new experience, after an unexpected accident has occurred, and as a measure of extreme caution, he may adopt additional safeguards. The more careful a person is, the more regard he has for the lives of others—the more likely he would be to do so,—and it would seem unjust that he could not do it without being liable to have such acts construed as an admission of prior negligence. We think such a rule puts an unfair interpretation upon human conduct and virtually holds out an inducement for continued negligence.”<sup>1</sup> A municipal corporation may have done all that ordinary care required and yet its officers, shocked by a misfortune which ordinary prudence could not have foreseen, may then do more than ordinary care requires in order to prevent the possibility of injury in the future, and it is neither just nor expedient to declare a rule that will operate to restrain corporate officers from profiting by experience and doing what experience has shown them should be done.<sup>2</sup>

The rule that evidence of repairs made after the injury to the plaintiff occurred is incompetent does not apply to a case where the corporation defends upon the ground that it had no funds with which to repair the street. In such a case we think that the evidence would clearly be competent, not, indeed, for the purpose of establishing antecedent negligence, but for the purpose of opposing the evidence that the corporation had no funds at its command. It would not, then, be competent as original evidence, but it would be competent in reply to the defendant's evidence in support of the defense founded on the want of funds. That defense, as we have elsewhere said, must be made out by the defendant (the reason for this rule is sufficiently proved by its statement: the matter is one peculiarly within the knowledge of the corporation), and to defeat it the plaintiff may show that repairs were made, but the corporation may, of course, explain the fact by evidence that when the

<sup>1</sup> *Per* Mitchell, J., in *Morse v. Minneapolis, etc., Co.*, 30 Minn. 465.

<sup>2</sup> The occurrence of an accident does not, of itself, authorize the inference that there was antecedent negligence,

unless there is something in the nature of the accident that indicates negligence. *Beatty v. Central Iowa R. W. Co.*, 58 Ia. 242; *The Wabash, St. Louis, etc., Co. v. Locke*, 112 Ind. 404, 411.

accident occurred it had no funds, although it subsequently acquired them.

While evidence of additional precautions or subsequent repairs is not competent for the purpose of proving antecedent negligence, it may in some cases be competent for other purposes. Thus, it may be competent for the purpose of showing that the place where the injury was received was under the control of the defendant,<sup>1</sup> and, as we have already suggested, it may be competent in cases where the defence is a want of funds. So, too, it may be competent where the question is whether the place where the accident occurred has been changed since the occurrence, for it is proper to show that fact in many cases.<sup>2</sup> If the evidence is introduced upon any legitimate point the defendant may require the court to restrict it to that point by a proper instruction.<sup>3</sup>

Whether it is competent for a non-expert witness to give an opinion that a road or street is or is not in reasonable repair is a question upon which there is some conflict.<sup>4</sup> It seems to us that the evidence is competent for the reason that it falls within the rule that the conclusions of a witness are competent where the facts are such as he can not accurately and intelligently describe.<sup>5</sup> It is often very difficult to lay before a jury

<sup>1</sup> *Weaver v. City of Lafayette*, 92 Ind. 477. In this case it was said of the evidence: "This was not admissible to prove negligence on the part of the city, that question was to be determined by what was known before, and at the time of the accident.

<sup>2</sup> It is competent to show the condition of the place before and after the injury if no change has been made. *Hirsch v. City of Buffalo*, 107 N. Y. 671; *City of Chicago v. Dalle*, 115 Ill. 386, S. C. 5 N. E. R. 578; *Yates v. People*, 32 N. Y. 509; *Nesbit v. Town of Garner*, 75 Ia. 314; *Clancy v. Byrne*, 56 N. Y. 129, S. C. 15 Am. R. 391; *Mackie v. Central R. R. Co.*, 54 Ia. 405, S. C. 5 N. W. R. 723.

<sup>3</sup> *Sewell v. City of Cohoes*, 11 Hun.

626; *City of Lafayette v. Weaver*, 92 Ind. 477.

<sup>4</sup> *Clark Civil Township v. Brookshire*, 114 Ind. 437, S. C. 16 N. E. R. 132; *Lund v. Inhabitants of Tyngsborough*, 63 Mass. 36; *Kelleher v. City of Keokuk*, 60 Ia. 473. Compare *Yeaw v. Williams*, 15 R. I. 123, and *Topeka v. Sherwood*, 39 Kan. 690, S. C. 18 Pac. R. 433. See, also, *Alexander v. Town of Mt. Sterling*, 71 Ill. 366; *Louisville, etc., R'y Co. v. Donnegan*, 111 Ind. 179; *I. & G. N. R'y Co. v. Klaus*, 64 Tex. 293; *College v. McHugh*, 21 Tex. 256; *Carroll v. Welch*, 26 Tex. 147; *Porter v. Pequonnock Manf. Co.*, 17 Conn. 249; *Clinton v. Howard*, 42 Conn. 294.

<sup>5</sup> *Atchison, etc., Co. v. Miller*, 39

facts so clearly and intelligently that they can form a just conclusion, and in such cases they may be greatly aided by the opinions of witnesses who have examined the locality. There is difficulty in drawing the line between competent and incompetent opinion evidence in this class of cases, and the cases represent many and various phases. In one case it was held that it was not competent to ask a witness whether a prudent man would have ventured to cross the dangerous place.<sup>1</sup> Some of the courts affirm that it is competent for a witness to give an opinion as to whether a crossing is dangerous or not,<sup>2</sup> but other courts deny this doctrine.<sup>3</sup> It was held in a Maryland case that it was competent to permit a witness to state whether the height and span of a bridge were sufficient to permit the water of the stream to pass,<sup>4</sup> and in another case a similar rule was made as to a culvert.<sup>5</sup> The established rule is that a "witness can not be asked his opinion respecting the very point which the jury are to determine,"<sup>6</sup> and it is for this reason that it is held that he can not give his opinion whether a road is or is not of public utility in cases where that is the very point which the jury are to determine.<sup>7</sup> In all cases where an opinion is expressed by a non-expert witness, it is competent on cross-examination to elicit all the facts within his knowledge, and the opinion of such a witness is of weight only when it is supported by the facts.

Kan. 419, S. C. 18 Pac. R. 486; *Bennett v. Meehan*, 83 Ind. 566, S. C. 43 Am. R. 78. See, generally, *Barnes v. Ingalls*, 39 Ala. 193; *McKonkey v. Gaylord*, 1 Jones (N. C.), 94; *Cunningham v. Hudson River Bank*, 21 Wend. 557; *Currier v. Boston, etc., Co.*, 34 N. H. 498; *Killian v. Augusta, etc., Co.*, 78 Ga. 749, S. C. 3 S. E. R. 621.

<sup>1</sup> *Town of Albion v. Hetrick*, 90 Ind. 545. A witness may often express an opinion as to the condition of a place or thing. *Rust v. Eckler*, 41 N. Y. 488; *Com. v. Sturtevant*, 117 Mass. 122; *Wynne v. State*, 56 Ga. 113; *Meyers v. State*, 14 Tex. App. 35; *Moore v. Wertervelt*, 27 N. Y. 234; *People v. Driscoll*, 107 N. Y. 414; *Alabama, etc.,*

*Co. v. Yarbrough*, 83 Ala. 238, 3 Am. St. R. 715.

<sup>2</sup> *Laughlin v. Grand Rapids, etc., R. R. Co.*, 62 Mich. 220, S. C. 28 N. W. R. 873.

<sup>3</sup> *King v. Missouri, etc., Co. (Mo.)*, 11 S. W. R. 563.

<sup>4</sup> *Hartford County v. Wise (Md.)*, 18 Atl. R. 31.

<sup>5</sup> *City of Indianapolis v. Huffer*, 30 Ind. 235.

<sup>6</sup> 2 Taylor on Evidence, section 1278, p. 1229. See *White v. Bailey*, 10 Mich. 155; *Fairchild v. Bascomb*, 35 Vt. 398.

<sup>7</sup> *Loshbaugh v. Birdsell*, 90 Ind. 466; *Yost et al. v. Conroy*, 92 Ind. 464, 471, S. C. 47 Am. R. 156; 1 Greenleaf's Evidence, section 440.



The duty of a public corporation does not demand of it that high degree of care which would be necessary to keep its roads and streets absolutely safe for passage at all times and hours, and, therefore, it is not ordinarily liable for injuries produced by defects caused by sudden and violent storms and extraordinary floods. In many cases an action may be successfully defended upon the ground that the injury resulted from an extraordinary flood, and in no case is a corporation liable for a defect or an obstruction in a highway produced by a sudden or violent storm until it has had a reasonable time in which to remove the obstruction or remedy the defect.<sup>1</sup> In cases dependent upon the question as to the violence of a storm or the quantity of water that fell the weather record of the United States signal service may often supply important evidence. The competency of such evidence has been asserted, in an opinion that must command universal assent, by the Supreme Court of the United States.<sup>2</sup>

The general rule is that only compensatory damages can be recovered in an action against a municipal corporation for personal injuries,<sup>3</sup> and in our judgment there can be no exceptions to this rule. The inhabitants of the locality, constituting, as they do, the corporation, really pay the damages, and where punishment in the form of exemplary damages is inflicted it falls on them, and this is neither just nor consistent with the underlying principle which sustains the rule declaring that vindictive damages may be recovered. The question as it is presented in an action against a city or county is radically different from that arising in an action against the direct author of the wrong and from one arising in an action against the officers whose breach of duty caused the injury, for in such a case vin-

<sup>1</sup> *Billings v. Worcester*, 102 Mass. 329; *Street v. Holyoke*, 105 Mass. 82; *Muller v. Newburg*, 32 Hun. 24; *Kinney v. Troy*, 38 Hun. 285; *Blakely v. Troy*, 18 Hun. 144; *Chicago v. McCulloch*, 10 Ill. 459; *Hubbard v. Concord*, 35 N. H. 52; *Barton v. Syracuse*, 36 N. Y. 54; *Springfield v. Le Claire*, 49 Ill. 476.

<sup>2</sup> *Evanston v. Gunn*, 99 U. S. 660.

<sup>3</sup> *Wilson v. Granby*, 47 Conn. 59; *Chicago v. Langlass*, 52 Ill. 256; *Wilson v. Wheeling*, 19 W. Va. 323; *Louisville, etc., Co. v. Shanks*, 94 Ind. 598; *Decatur v. Fisher*, 53 Ill. 407; *McGary v. Lafayette*, 12 Rob. (La.) 668; *Atchison v. King*, 9 Kan. 550; *Raymond v. Lowell*, 6 Cush. 524; *Hunt v. Booneville*, 65 Mo. 620.

dictive damages might operate directly upon the persons in fault, whereas in an action against the public corporation the tax payers who must suffer are not directly in fault, and can not be said to act maliciously, oppressively or recklessly.

Compensatory damages when properly measured yield the injured person all he is justly entitled to receive, for they give compensation for all loss he has suffered, and for all pain he has endured. Generally speaking, they include everything of which the plaintiff has been deprived as a proximate and natural consequence of the injury,<sup>1</sup> but do not include exemplary<sup>2</sup> nor merely speculative damages.<sup>3</sup> The plaintiff may, however, recover "not only the amount of damage which he has suffered prior to the commencement of the action, but also all the damage, proceeding continuously from the injury complained of, which he has suffered up to the verdict, and which it is reasonably certain he will suffer in the future."<sup>4</sup> When the action is for injury to the person of the plaintiff he may, in a proper case, recover the expense of his cure,<sup>5</sup> the value of the time lost by him during the continuance of his disabilities,<sup>6</sup> and reasonable compensation for the physical,<sup>7</sup> and mental<sup>8</sup> suffering

<sup>1</sup> *Huizega v. Cutler, etc., Co.*, 51 Mich. 272; *Central Passenger, etc., Co. v. Kuhn*, 86 Ky. 578, S. C. 6 S. W. R. 441; *Alexander v. Humber*, 86 Ky. 565, S. C. 6 S. W. R. 443; *Alabama, etc., Co. v. Yarborough*, 83 Ala. 238, S. C. 3 Am. St. Rep. 715; *Richmond, etc., Co. v. Norment*, 84 Va. 167, S. C. 4 S. E. R. 211; *Carthage Turnpike Co. v. Andrews*, 102 Ind. 138.

<sup>2</sup> *Burr v. Plymouth*, 48 Conn. 460; *Parsons v. Lindsay*, 26 Kan. 426; *Wallace v. New York*, 2 Hilt. 440, and authorities cited in note 3, *ante* 652.

<sup>3</sup> *Brown v. Chicago, etc., R. R. Co.*, 64 Ia. 652; *Phyfe v. Manhattan R'y Co.*, 30 Hun. 377; *Masterton v. Mt. Vernon*, 58 N. Y. 391; *Strohm v. N. Y., etc., R. R. Co.*, 96 N. Y. 305; *Clark v. Nevada Land Co.*, 6 Nev. 203.

<sup>4</sup> 2 *Shearman and Redfield on Negligence*, section 743; *Curtis v. Rochester, etc., R. R. Co.*, 18 N. Y. 534; *Spicer*

*v. Chicago, etc., R. R. Co.*, 29 Wis. 580; *Weisenberg v. Appleton*, 26 Wis. 56; *Scott Tp. v. Montgomery*, 95 Pa. St. 444; *Elkhart v. Ritter*, 66 Ind. 136; *Secord v. St. Paul, etc., R. R. Co.*, 18 Fed. Rep. 221; *Stafford v. Oskaloosa*, 64 Ia. 251.

<sup>5</sup> *Giblin v. McIntyre*, 2 Utah, 384; *Sheehan v. Edgar*, 58 N. Y. 631; *Peoria Bridge Ass'n v. Loomis*, 20 Ill. 235; *Varnham v. Council Bluffs*, 52 Ia. 698.

<sup>6</sup> *Nones v. Northouse*, 46 Vt. 587; *Wade v. Leroy*, 20 How. (U. S.) 34; *Memphis, etc., R. R. Co. v. Whitfield*, 44 Miss. 466.

<sup>7</sup> *Ransom v. N. Y., etc., R. R. Co.*, 15 N. Y. 415; *Oliver v. North Pac., etc., Co.*, 3 Ore. 84.

<sup>8</sup> *Masters v. Warren*, 27 Conn. 293; *Canning v. Williamstown*, 1 Cush. 451; *Malloy v. Bennett*, 15 Fed. Rep. 371; *Texas, etc., Co. v. Douglass (Tex.)*, 11 S. W. R. 333; *Weber v. Creston*, 75 Ia.

caused by the injury, as well as for the permanent reduction of his power to earn money.<sup>1</sup> He may also recover damages for a disease resulting from the accident or the exposure necessarily attendant thereon,<sup>2</sup> and for the aggravation of a pre-existing disease, so far as the same is caused by the accident.<sup>3</sup> But it has been held that he is not entitled to recover the cost of his board during the existence of his disability,<sup>4</sup> and evidence of the pecuniary condition of himself or family is generally inadmissible.<sup>5</sup> Where the action is by a parent for injury to his child the measure of damages is generally limited to an amount fully compensatory for the expenses of medical services and nursing, and the consequent loss of service for a period not exceeding the minority of the child.<sup>6</sup> The mental suffering of

16, S. C. 39 N. W. R. 126; Kennon v. Gilmer, 131 U. S. 22; Kendall v. Albia, 73 Ia. 241, S. C. 34 N. W. R. 833.

<sup>1</sup> Holyoke v. Grand Trunk R. R. Co., 48 N. H. 541; Knapp v. Sioux City, etc., R. R. Co., 71 Ia. 41, S. C. 32 N. W. Rep. 18; Totten v. Penna. R. R. Co., 11 Fed. Rep. 564; Sunney v. Holt, 15 Fed. Rep. 880, Indiana Car Co. v. Parker, 100 Ind. 181.

<sup>2</sup> Ehr Gott v. Mayor, 96 N. Y. 264; Terre Haute, etc., R. R. Co. v. Buck, 96 Ind. 346, S. C. 49 Am. Rep. 168, Browne v. Chicago, etc., R'y Co., 54 Wis. 342; Beauchamp v. Saginaw, etc., Co., 50 Mich. 163; Ohio, etc., R. R. Co. v. Hecht, 115 Ind. 443. Compare Hobbs v. L. & S. R. R. Co., L. R. 10 Q. B. 111; Pullman Palace Car Co. v. Barker, 4 Col. 344; Indianapolis, etc., R. R. Co. v. Birney, 71 Ill. 391.

<sup>3</sup> Louisville, etc., R. R. Co. v. Jones, 108 Ind. 551; Baltimore, etc., R. R. Co. v. Kemp, 61 Md. 74; Stewart v. Ripon, 38 Wis. 584; Louisville, etc., R. R. Co. v. Falvey, 104 Ind. 409; Tice v. Munn, 94 N. Y. 621; Louisville, etc., R. R. Co. v. Wood, 113 Ind. 544, and authorities cited on page 567. Lapleine v. Morgan, etc., Co., 40 La. Ann. 661, S. C. 1 Lawyers' R. Anno. 378; Driess v. Friederick (Tex.), 11 S. W. R. 493;

Louisville, etc., Co. v. Snider (Ind.), 20 N. E. R. 284; Dickson v. Hollister, 123 Pa. St. 421, S. C. 16 Atl. 484. See, however, Abbott v. Tolliver, 71 Wis. 64; Whelan v. N. Y., etc., Co., 38 Fed. R. 15.

<sup>4</sup> Graeber v. Derwin, 43 Cal. 495.

<sup>5</sup> Shea v. Potrero, etc., R. R. Co., 44 Cal. 414; Eagle Packet Co v. Defries, 94 Ill. 598; Rooney v. Milwaukee, etc., Co., 65 Wis. 397; Hagan's Pet., 7 Cent. L. J. 311; Chicago v. O'Brennan, 65 Ill. 160; Driess v. Friederick, 57 Tex. 70; Mackoy v. Mo. Pac. R. R. Co., 18 Fed. Rep. 236, Indianapolis, etc., Co. v. Pitzer, 109 Ind. 190; Mayhew v. Burns, 103 Ind. 328. Compare Cooper v. Lake Shore, etc., R. R. Co. (Mich.), 33 N. W. Rep. 306; Shaber v. St. Paul, etc., R. R. Co., 28 Minn. 103.

<sup>6</sup> 2 Shearm. & Redf. Neg., section 763; Traver v. Eighth Ave. R. R. Co., 42 N. Y. (3 Keyes) 497; Oakland R. R. Co. v. Fielding, 48 Pa. St. 320; Gilligan v. Harlem R. R. Co., 1 E. D. Smith, 453. From this must generally be deducted the cost of maintenance. Benton v. Chicago, etc., R. R. Co., 55 Ia. 496; Birmingham v. Dorer, 3 Brewst. 69; St. Louis, etc., R'y Co. v. Freeman, 36 Ark. 41; Penna. Co. v. Lilly, 73 Ind. 252.

the parent caused by the injury to the child should not be taken into account.<sup>1</sup>

In many of the States it is provided by statute that the widow or next of kin may recover damages for the pecuniary injury resulting from the death of a person caused by the negligent act of another. The courts, in construing these statutes, have restricted the damages recoverable in such cases to an amount which will fairly compensate the person for whose benefit the action is brought for his *pecuniary* loss.<sup>2</sup> Neither physical nor mental suffering can, in jurisdictions where such statutes exist, be taken into account.<sup>3</sup> The statutes of Connecticut, Kentucky, Missouri, Tennessee and Texas contain no such limitation, "and in those States the plaintiff may recover the same damages which the deceased might have recovered had the injury been just less than fatal."<sup>4</sup> The probable duration of life may be taken into consideration,<sup>5</sup> and this may be shown by the Northampton or other standard and approved life tables.<sup>6</sup> The damages are usually estimated upon this basis, and their measure is the reasonable expectation of pecuniary advantage for the continuance of the life of the deceased.<sup>7</sup>

It is impossible to lay down any general rule for the admeasurement of damages in the class of cases which we are considering; much must be left to the sound discretion of the jury,

<sup>1</sup> *Galveston v. Barbour*, 62 Tex. 172. In an action by a husband against a county for injury caused the wife by a defective bridge he can not recover damages for a loss of the wife's companionship. *Board of Comm'rs v. Legg*, 93 Ind. 523.

<sup>2</sup> *Blake v. Midland R. R. Co.*, 18 Q. B. 93; *Telfer v. Northern R. R. Co.*, 30 N. J. L. 188; *Chicago v. Major*, 18 Ill. 349; *Penna. R. R. Co. v. Henderson*, 51 Pa. St. 315; *Ohio, etc., R. R. Co. v. Tindall*, 13 Ind. 366; *Cooper v. Lake Shore, etc., R. R. Co. (Mich.)*, 33 N. W. Rep. 306; *Holmes v. Oregon, etc., R'y Co.*, 5 Fed. Rep. 523.

<sup>3</sup> *Lehman v. Brooklyn*, 29 Barb. 234; *Penna. R. R. Co. v. Vandever*, 36 Pa. St. 298; *Mynning v. Detroit, etc., R. R.*

*Co.*, 59 Mich. 257; *Etherington v. P. P., etc., R. R. Co.*, 88 N. Y. 641; *Kansas Pac. R. R. Co. v. Cutter*, 19 Kan. 83; *Compare Baltimore, etc., R. R. Co. v. Noell*, 32 Gratt. 394.

<sup>4</sup> 2 *Shearm. & Redf. Neg.*, section 767. See, also, *Owen v. Brockschmidt*, 54 Mo. 285.

<sup>5</sup> *Baltimore, etc., R. R. Co. v. State*, 33 Md. 542; *Scheffler v. Minneapolis, etc., R'y Co.*, 32 Minn. 518.

<sup>6</sup> *Sauter v. N. Y. Cent., etc., R. R. Co.*, 66 N. Y. 50. See, also, *Schell v. Plumb*, 55 N. Y. 592; *Ætna Life Ins. Co. v. Nexson*, 84 Ind. 347; *Lewis v. Atlas, etc., Ins. Co.*, 61 Mo. 534.

<sup>7</sup> *Collins v. Davidson*, 19 Fed. Rep. 83.

but it is the duty of the court to instruct them that only compensatory damages are recoverable and to state what elements may be considered in computing the damages. "Damages in such a case," said the court, in a case before it, "must be left to the common sense of the jury, assisted by the presiding judge."<sup>1</sup> While the jury have a wide discretion, still, it is the duty of the court to so frame its charge as to limit the recovery to compensatory damages, and where evidence is admissible for one purpose, but not for the purpose of augmenting the damages, it is the duty of the court to instruct the jury not to permit such evidence to be considered on the question of damages.<sup>2</sup>

When a municipality has been compelled to pay damages for injuries sustained by reason of the wrongful acts of a third person which render its streets unsafe, it has a remedy over against him, unless as to such person the corporation is itself a wrong-doer.<sup>3</sup> Where such a remedy over exists, it is customary and proper for the city to notify the original wrong-doer of the pendency of the action against it, and request him to come in and defend. The advantage to the city in so doing consists in the fact that he will then be concluded by the judgment as to the existence of the defect, the liability of the corporation for the injury, and the amount of damages occasioned by the defect.<sup>4</sup> He will not, however, be estopped from showing that

<sup>1</sup> *Fair v. London, etc., Co.*, 21 L. T. R. 326. See, also, *Collins v. Council Bluffs*, 32 Ia. 324, S. C. 34 Am. R. 200; *Chicago v. Martin*, 49 Ill. 241; *Ainsworth v. Southeastern etc., Co.*, 11 Jur. 760; *Weeks v. Shirley*, 33 Me. 271.

<sup>2</sup> *City of Delphi v. Lowery*, 74 Ind. 520; *Chicago, etc., Co. v. Becker*, 76 Ill. 25; *Steel v. Kurtz*, 28 Ohio St. 191; *Blake v. The Midland, etc., Co.*, 10 Eng. L. & E. 437; *Telfer v. The Northern, etc., Co.*, 30 N. J. L. 188. Broad as the discretion of the jury is it can only be exercised upon proper facts and it is the duty of the court to restrict them to such facts.

<sup>3</sup> *Milford v. Holbrook*, 9 Allen, 17;

*Woods v. Groton*, 111 Mass. 357; *Brooklyn v. City R. R. Co.*, 47 N. Y. 475; *City of Rochester v. Montgomery*, 72 N. Y. 65, 67; *Catterlin v. Frankfort*, 79 Ind. 547; *City of Elkhart v. Wickwire*, 87 Ind. 77; *McNaughton v. City of Elkhart*, 85 Ind. 384; *Chicago v. Robbins*, 2 Black, 418; *Robbins v. Chicago*, 4 Wall. 657.

<sup>4</sup> *Boston v. Worthington*, 10 Gray, 496; *Portland v. Richardson*, 54 Me. 46; *Mayor v. Troy, etc., R. R. Co.*, 49 N. Y. 657; *Seneca Falls v. Zalinski*, 8 Hun. 571; *City of Rochester v. Montgomery*, 72 N. Y. 65. See, also, *Morgan v. Muldoon*, 82 Ind. 347; *Bever v. North*, 107 Ind. 544.

he was under no obligation to keep the street in a safe condition and was free from fault.<sup>1</sup> The omission to give such notice does not affect the right of action, but simply imposes upon the city the burden of again litigating the matter and establishing the actionable facts.<sup>2</sup> In the absence of any statutory provision upon the subject, formal notice in writing is not necessary;<sup>3</sup> and notice may even be implied from the party's knowledge of the pendency of the action and participation in its defense.<sup>4</sup> If, after notice and request to defend, the person who wrongfully created the obstruction which caused the injury fails to make any defense to the action against the city and the city defends it for him, it may, if guilty of no misfeasance itself, recover from him not only the amount of the judgment recovered from it, but also all reasonable and necessary expenses incurred in defending the action, including reasonable attorney fees.<sup>5</sup>

<sup>1</sup> *City of Chicago v. Robbins*, 2 Black (U. S.), 418, S. C. 4 Wall. 657.

<sup>2</sup> *Village of Port Jervis v. First Nat. Bank*, 96 N. Y. 550; *Aberdeen v. Blackmar*, 6 Hill, 324; *Binsee v. Wood*, 37 N. Y. 530.

<sup>3</sup> *Robbins v. Chicago*, 4 Wall; 657; *Barney v. Dewey*, 13 Johns. 225; *Beers v. Pinney*, 12 Wend. 309.

<sup>4</sup> *Village of Port Jervis v. First Nat. Bank*, 96 N. Y. 550; *Morgan v. Muldoon*, 82 Ind. 347.

<sup>5</sup> *Westfield v. Mayo*, 122 Mass. 100, S. C. 23 Am. Rep. 292; *Veazie v. Penobscot R. R. Co.*, 49 Me. 119. *Contra*, *Littleton v. Richardson*, 32 N. H. 59.

## CHAPTER XXXIII.

### ABANDONMENT, VACATION AND REVERSION.

“Once a highway always a highway,” is an old maxim of the common law to which we have often referred, and so far as concerns the rights of abutters, or others occupying a similar position, who have lawfully and in good faith invested money or obtained property interests in the just expectation of the continued existence of the highway, the maxim still holds good. Not even the legislature can take away such rights without compensation. But where no such rights are involved, the public may either abandon or vacate a highway; and where such rights do exist they may also be abandoned by those entitled to assert them, or the road or street may be vacated by proper legal proceedings and the payment of due compensation. It is proper, therefore, to state that a highway may cease to exist either by abandonment or by vacation according to law.<sup>1</sup>

If it is shown that a highway was once laid out pursuant to law, or created by dedication, the burden of showing a discontinuance, abandonment or vacation is upon the party who asserts that the public and the abutting owners have lost or surrendered their rights. In the absence of satisfactory evidence of discontinuance, vacation or abandonment, the presumption is in favor of the continuance of the highway with the principal and incidental rights attached to it. Not only is this so by force of the maxim we have quoted, but it is so by force of the elementary rule that “a thing shown to exist is presumed to continue until the contrary is made to appear.”

Where a way has ceased to be used and another is acquired

<sup>1</sup> A highway owned by a private corporation does not necessarily cease to be a highway upon its abandonment by the corporation, for it may become a public road in the strict sense of the term. *Stout v. Noblesville, etc., Co.*, 83 Ind. 466. *Ante*, 54.

in its place, this may operate as an abandonment of the former.<sup>1</sup> Evidence of the sowing of grain and the pasturing of cattle at the side of a road, but not within the traveled path, is not, however, sufficient to show an abandonment by the public.<sup>2</sup> And it is held by the Supreme Court of Ohio that proof that no work had been done on a road by the public authorities for fifteen years; that it was in bad condition and even impassable at times; that a new road had been established in the same vicinity, to which travel had been diverted for over eleven years; and that the old road had been partially fenced in, is not sufficient to show its abandonment by the public.<sup>3</sup> So, in Maine,

<sup>1</sup>City of Peoria v. Johnston, 56 Ill. 45; Champlin v. Morgan, 20 Ill. 181; Galbraith v. Littlech, 73 Ill. 210; Warner v. Holyoke, 112 Mass. 362. See, also, Jeffersonville, etc., R. R. Co. v. O'Connor, 37 Ind. 95; Hamilton v. State, 106 Ind. 361; Davie v. Huebner, 45 Ia. 574.

<sup>2</sup>Watkins v. Lynch, 71 Cal. 21. We suppose that the situation of a public way exerts an important influence upon the question whether it has or has not been abandoned. If there are other ways in the vicinity affording equal facilities for ingress and egress and for travel such unequivocal acts indicative of an abandonment can not be reasonably required, but where the rights of abutters would be seriously impaired it is no more than reasonable to require strong and clear evidence. Where the private use made of a highway is not such as necessarily asserts that abutters and the public have lost their rights it can not be justly considered as sufficient evidence of abandonment. An English author says: "And the highway can not be changed or diverted without the King's license or the authority of Parliament. And even if it have not been used, no length of time will be sufficient to prevent the King's subjects from using the way again if they think proper." Woolrych on

Ways, 14; 4 Law Library, 11. The author quoted in another place states the rule still stronger, for he says: "Highways which have been once established as such, whether by reputation, dedication to the public or otherwise, can not be destroyed as we have before said. But this general principle must be understood subject to the authority of Parliament." *Ibid*, 60, 47. Throughout the English cases there is manifested a reluctance to permit the discontinuance of highways and an earnest determination to maintain them. Mr. Woolrych, in illustration of the general doctrine, says: "It is worthy of observation that the public having a vested right in the highways can not be deprived of them except by express words." *Ibid*, 70, 55.

<sup>3</sup>Kelly Nail, etc., Co. v. Lawrence Furnace Co., 22 N. E. Rep. 639. So, in Missouri, it has been held that ten years non-user of a highway, and its inclosure by an adjoining land owner will not amount to an abandonment. State v. Culver, 65 Mo. 607, S. C. 27 Am. Rep. 295. See, also, Rose v. Bottyer, 22 Pac. Rep. (Cal.) 393. Nor is the fact that a line has been drawn across an official map, after dedication, sufficient evidence of abandonment. City of Eureka v. Armstrong, 22 Pac. Rep. (Cal.) 828.



where a town way three yards in width had been enlarged by a new location, to the extent of half a rod on each side, it was held that "using any part of the three rods was, in effect, using the four rods," and that the way should not be considered as vacated or discontinued, notwithstanding fences remained for thirty-seven years thereafter along the old line, and notwithstanding a statutory provision that highways, although duly laid out, should be considered as discontinued unless actually opened within six years from the time allowed therefor.<sup>1</sup>

In determining whether a highway has been abandoned, it is proper to consider the mode in which the abutters and the public acquired their rights as well as what the necessity and convenience brought about by subsequent progress and growth may require.<sup>2</sup> Roads and streets are frequently laid out or dedicated with reference to future requirements as well as with reference to the existing condition of things, and it is not just to assume that because all of the way is not used by the public or by the abutters that it has been abandoned. It may well be that some private use of the way may be permitted without impairing the rights of the public or of abutting owners, and where it is reasonable to infer that the public and the abutters have not surrendered their rights it can not be justly assumed that the way has been abandoned, although the private use of it may be very considerable. It is to be remembered, too, that the rights of the public are seldom guarded with the vigilant care with which owners of private property guard their own

<sup>1</sup> *Heald v. Moore*, 9 Atl. Rep. 734. See, also, *Baker v. Runnels*, 12 Me. 235; *Humphreys v. Borough of Woodstown* (N. J.), 7 Atl. Rep. 301, and compare *State v. Cornville*, 43 Me. 427. It was held, under a similar statute in New York, that a county road over which the corporate limits of a city were extended ceased to be a public highway after six years, where it appeared that the city had never assumed any care or control of it and it had never been opened and worked by any public authority. *City of Cohoes v. Delaware, etc., Canal Co.*, 7 N. Y. Supp. 885.

<sup>2</sup> In *Reilly v. City of Racine*, 51 Wis. 526, it was said: "Until the time arrives when any street or part of a street is required for actual public use, and where the public authorities may be properly called upon to open it for the public use, no mere non-user of any length of time will operate as an abandonment of it, and all persons in possession of it will be presumed to hold subject to the paramount right of the public." See *Henshaw v. Hunting*, 1 Gray, 203.

rights, and acts or omissions which might weigh heavily against individual owners can not always be assigned much force against the public. There is, therefore, a clear and a valid reason for discriminating between public and private rights.

The legislature has power to vacate a street in a city, and this power it may delegate to the municipal authorities.<sup>1</sup> But the power must be conferred in express terms or by necessary implication, and the construction of ambiguous words alleged to confer it "ought to be in favor of the common right of highway."<sup>2</sup> Highways can not, in any event, be discontinued for the purpose of devoting them to private and inconsistent uses.<sup>3</sup> It has been held in California that the alteration of an existing road by competent authority operates as a discontinuance of such portions of the way as are not within the newly assigned limits, although no special order of discontinuance is made.<sup>4</sup> But in Indiana the refusal to order a highway located upon the lines of an existing highway will not vacate the latter.<sup>5</sup> Parol

<sup>1</sup> *Brook v. Horton*, 68 Cal. 554; *Pillsbury v. Augusta*, 79 Me. 71; *McGee v. Penna. R. R. Co.*, 114 Pa. St. 470; *State v. Huggins*, 47 Ind. 586; *Gray v. Iowa Land Co.*, 26 Ia. 387; *Kimball v. Kenosha*, 4 Wis. 321; *Coster v. New York*, 43 N. Y. 399; *Kellinger v. Railroad Co.*, 50 N. Y. 206; *Riggs v. Board*, 27 Mich. 262; *Hinchman v. Detroit*, 9 Mich. 103; *Bailey v. Railroad Co.* 4 Harr. (Del.) 389.

<sup>2</sup> *Jersey City v. N. J. Cent. R. R. Co.*, 40 N. J. Eq. 417; *Newark v. Del.*, etc., R. R. Co., 42 N. J. Eq. 196. Authority to discharge the public easement in a street is not inherent in the municipality. *Hoboken Land Co. v. Hoboken*, 36 N. J. L. 540.

<sup>3</sup> *Glasgow v. St. Louis*, 87 Mo. 678; *Dubach v. Hannibal*, etc., R. R. Co., 89 Mo. 483; *Warren v. Lyons*, 22 Ia. 351; *Indianapolis*, etc., R. R. Co. v. State, 37 Ind. 489; *Portland*, etc., R. R. Co. v. Portland, 14 Ore. 188; *Winchester v. Capron*, 63 N. H. 605; *LeClerc v. Gallipolis*, 7 Ohio St. pt. 1, 217, S. C. 28 Am. Dec. 641; *In re John and Cherry*

*Streets*, 19 Wend. 659. See, also, *Stevenson v. Mayor*, etc., 20 Fed. Rep. 586; *Att'y General v. Goodrich*, 5 Grant (Can.), 402.

<sup>4</sup> *Brook v. Horton*, 68 Cal. 554. So, in *Massachusetts Commonwealth v. Westborough*, 3 Mass. 406; *Bowley v. Walker*, 8 Allen, 21; *Hobart v. Plymouth Co.*, 100 Mass. 159. Compare *Sprague v. Waite*, 17 Pick. 309. In the case of *Commonwealth v. Boston*, etc., Co., 22 N. E. Rep. 913, a petition was filed for the alteration of a road so as to avoid several hills near the point where it terminated in another road, and the county commissioners, in accordance with the petition, located a new road around the hills. The court held that the location of the new road operated as a discontinuance of the portion of the old road which ran over the hills, notwithstanding the fact that the latter was used and repaired for several years thereafter.

<sup>5</sup> *Washington Ice Co. v. Lay*, 103 Ind. 48. See, also, *Patton v. Cresswell* (Ind.), 21 N. E. Rep. 663.

evidence that a street has been abandoned is not admissible to show that it has been vacated by legal proceedings, for the best evidence of the vacation is the record.<sup>1</sup> Proceedings for the vacation of a road or street are essentially judicial and can only be prosecuted before a tribunal possessing at least *quasi* judicial power, and such tribunals should, and generally do, speak by their records.

The legislature by virtue of its general power over the highways of the State may, as we have said, undoubtedly order the vacation of such of them as it may deem expedient to vacate, but where the vacation of a highway will cause special injury to an adjoining owner he is entitled to compensation. It is substantially agreed by the courts that the abutter has a private interest in the road or street as such, and if he has this right it is property which can not be taken from him without compensation. The right to a road or street which the land owner possesses as one of the public is different from that which vests in him as an adjoining proprietor, and it is also distinct and different from his rights as owner of the servient estate. The right which an abutter enjoys as one of the public and in common with other citizens is not property in such a sense as to entitle him to compensation on the discontinuance of the road or street, but with respect to the right which he has in the highway as a means of enjoying the free and convenient use of his abutting property it is radically different for this right is a special one. If this special right is of value—and it is of value if it increases the worth of his abutting premises,—then it is property, no matter whether it be of great or small value. Its value may furnish the standard for measuring the compensation, but it can not change the nature of the right itself. For this reason, we think that the discontinuance or vacation of a street in such a manner as to prevent access to the property of an adjoining owner is a “taking” of property within the constitutional inhibition and can not be lawful without compensation to such owner. This proposition is not without the support

<sup>1</sup> *Lathrop v. Cent. Ia. R. R. Co.*, 69 Ia. 105. The fact of non-user, and the situation and surroundings of the way may, of course, be shown by parol, but where an order of a local board or of local officers is relied on, then record evidence is required.

of authority as well as reason,<sup>1</sup> although it is true that there are many cases which assert or give countenance to a contrary doctrine.<sup>2</sup> In New York it is held that the legislature may, without making provision for compensation to adjoining owners, authorize the vacation and closing of one public way to their property, provided another way is left open,<sup>3</sup> but we are unable to perceive any sufficient reason for such a distinction.<sup>4</sup>

Owners of lands abutting upon neighboring streets, or upon other parts of the same street, are not, however, entitled to damages, notwithstanding the value of their lands may be lessened by its vacation or discontinuance.<sup>5</sup> This rule was applied by the New York Court of Appeals in a case in which it appeared that the removal of a bridge connecting a pier with the adjoining land made it necessary for the plaintiff, in order to reach his store, to go over another bridge at a much greater distance,<sup>6</sup> and a similar ruling was made by the same court where a street was closed in front of another's property, leav-

<sup>1</sup> *Pearsall v. Eaton* (Mich.), 42 N. W. Rep. 77; *Haynes v. Thomas*, 7 Ind. 38; *Indianapolis v. Croas*, 7 Ind. 9. See, also, *Butterworth v. Bartlett*, 50 Ind. 537; *Petition of Concord*, 50 N. H. 530; 2 *Smith's Lead. Cas.* (8th Am. ed.) 177; 1 *Hare's Const. Law*, 377. 382; *Indianapolis, etc., R. R. Co. v. Hartley*, 67 Ill. 439, S. C. 16 Am. Rep. 624; *Elizabeth, etc., R. R. Co. v. Combs*, 10 Bush. 382, S. C. 19 Am. Rep. 67; *Cincinnati v. White*, 6 Peters, 431.

<sup>2</sup> *McGhee's Appeal*, 114 Pa. St. 470; *Paul v. Carver*, 12 Harris, 211; *Polack v. Trustees*, 48 Cal. 490; *Barr v. Oskaloosa*, 45 Ia. 275; *Gerhard v. Seekonk Comm'rs* (R. I.), 5 Atl. Rep. 199, 201. In Rhode Island it is held that the owners of land around a public park, the fee of which is in the city, have no such interest as will entitle them to compensation upon its discontinuance and sale by the city under legislative authority. *Clarke v. Providence*, 15 Atl. Rep. 763.

<sup>3</sup> *Coster v. New York*, 43 N. Y. 399; *Fearing v. Irwin*, 55 N. Y. 486.

<sup>4</sup> It has also been held that no damages should be allowed for the discontinuance of a highway which was not legally laid out and opened. *Perry v. Sherborn*, 11 Cush. 388; *People v. Griswold*, 2 N. Y. Sup. Ct. 351. So, where the road had not been used for over twenty years. *Eames v. Northumberland*, 44 N. H. 67.

<sup>5</sup> *Smith v. City of Boston*, 7 Cush. 254; *Coster v. Mayor*, 43 N. Y. 414; *Kings Co. Fire Ins. Co. v. Stevens*, 101 N. Y. 411; *Heller v. Atchison, etc., R. R. Co.*, 28 Kan. 625; *Kimball v. Hoeman* (Mich.), 42 N. W. R. 167; *Castle v. County of Berkshire*, 11 Gray, 26; *City of East St. Louis v. O'Flynn*, 119 Ill. 200, S. C. 10 N. E. R. 395, S. C. 59 Am. R. 795. But see *Petition of Concord*, 50 N. H. 530, decided under the New Hampshire statute.

<sup>6</sup> *Coster v. Mayor*, 43 N. Y. (4 Hand.) 399.

ing the complaining party no outlet except a passage-way twelve feet wide to another street.<sup>1</sup>

Whether it is expedient to discontinue a highway is a question for legislative decision, and when the authority to discontinue is delegated to local officers, and no restrictions are placed upon its exercise, the officers are invested with a very broad discretion, and unless this discretion has been abused the courts can not interfere. This is in accordance with the general rule that where officers are invested with discretionary power courts will not substitute their judgment for that of the officers invested by law with the right to decide upon the necessity or expediency of doing a designated act.<sup>2</sup>

Proceedings to vacate or discontinue highways are regulated by local statutes which differ materially in different jurisdictions. It is impossible, therefore, to state many rules of general application, and it would not be profitable to consider in detail the mode of procedure in any particular jurisdiction. The local statute must be substantially followed in all material respects, and a failure to give notice to abutting property owners as required by statute may invalidate the entire proceedings.<sup>3</sup> Thus, it is held in Massachusetts that action to discontinue a highway can properly be taken only by a tribunal proceeding judicially, after notice to the land owners along the

<sup>1</sup> *Kings Co. Fire Ins. Co. v. Stevens*, 101 N. Y. 411. We suppose that there is a right to compensation only where the easement of access is directly impaired, for we conceive that the proprietary right of an adjoining owner is, as against the public—although it is otherwise as to one who dedicates land by a plat—confined to the street or streets on which his property abuts. As against the public he can not be deemed to have a special private right in any other street.

<sup>2</sup> *Platt v. Chicago, etc., R. R. Co. (Ia.)*, 31 N. W. R. 883; *Leeds v. City of Richmond*, 102 Ind. 372; *City of Kokomo v. Mahan*, 100 Ind. 242; *Weaver v. Templin*, 113 Ind. 298, and authorities there cited.

<sup>3</sup> *Price v. Stagray (Mich.)*, 35 N. W. R. 815; *James v. Darlington (Wis.)*, 36 N. W. R. 835. The English courts require a strict compliance with the statute. In *Rex v. Jones*, 12 Ad. & E. 684, it was said: "There is no part of the administration of the law by justices acting on their own authority in which it is more necessary for the court to look closely at their proceedings than the stopping of highways." It was held in another case that all the particulars required by the statute must appear on the face of the certificate. *Rex v. Justices of Worcestershire*, 23 L. M. J. 113. See, also, *De Ponthieu v. Penynyfather*, 5 Taunt. 634; *Rex v. Milverton*, 5 Ad. & E. 841; *Rex v. Sheppard*, 3 B. & A. 414.

way, and that a town can not, by a mere vote, alter the boundary lines of a town way and discontinue that portion lying outside of the new lines, although the statute provides that "a town, at a meeting regularly called for the purpose, may discontinue any town or private way."<sup>1</sup> Unless authorized by statute, the board of county commissioners have no power to vacate a city street.<sup>2</sup> If the common council of a city make an illegal order for the vacation of a street an injunction will lie to prevent its enforcement.<sup>3</sup> Under the statutes of Indiana a portion of a highway which ceases to be of public utility may be vacated without discontinuing the entire way.<sup>4</sup> The question of public utility, being the exact point in issue in such cases, is a question upon which witnesses can not give their opinions in evidence.<sup>5</sup> The record order of vacation is the best evidence, all other evidence is secondary, and parol evidence is not admissible to prove even the time of making the order in cases where it can be shown by the record.<sup>6</sup> It is, however, probably true that if it were properly shown that no record entry was made secondary evidence would be competent,<sup>7</sup> but until this is shown, or the foundation for secondary evidence properly laid in some other method, the only legitimate evidence is the record.<sup>8</sup>

Where a city is interested in what may be called its private capacity as the owner of property, it is generally conceded that the statute of limitations will run against it to the same extent as against a private citizen.<sup>9</sup> But as to matters in which the

<sup>1</sup> *Lincoln v. Inhabitants of Warren* (Mass.), 23 N. E. R. 45.

<sup>2</sup> *City of Ottawa v. Rohrbough* (Kan.), 21 Pac. R. 1061.

<sup>3</sup> *Spiegel v. Gansberg*, 44 Ind. 418. See *Sawyer v. Myer*, 45 Ia. 152.

<sup>4</sup> *Hughes v. Beggs*, 114 Ind. 427, S. C. 16 N. E. R. 817.

<sup>5</sup> *Hughes v. Beggs*, 114 Ind. 427, S. C. 16 N. E. R. 817; *White v. Bailey*, 10 Mich. 155; *Fairchild v. Bascomb*, 35 Vt. 398, 2 Taylor's Ev., section 1278.

<sup>6</sup> *Whetton v. Clayton*, 111 Ind. 360. See, also, *Lathrop v. Cent. Ia. R. R. Co.*, 69 Ia. 105.

<sup>7</sup> *State v. Hauser*, 63 Ind. 155.

<sup>8</sup> *Monaghan v. School District*, 38 Wis. 101; *O'Malley v. McGinn*, 53 Wis. 353. The record must be one authorized by law and must be proved. *Smith v. Lawrence*, 12 Mich. 431; *Samborn v. School District*, 12 Minn. 17; *Allen v. City of Vincennes*, 25 Ind. 531; *United States v. Kuhn*, 4 Cranch. C. C. 401. See *District of Columbia v. Johnson*, 1 Mackey, 51.

<sup>9</sup> *Wood on Limitations*, section 53; *Burlington v. Railroad Co.*, 41 Ia. 134; *Koshkonong v. Burton*, 104 U. S. 668; *Evans v. Erie Co.*, 66 Pa. St. 222;

public are interested and in which the city acts as a governmental agency, the law is not so well settled. In Arkansas, Connecticut, Iowa, Kentucky, Michigan, Ohio, South Carolina, Vermont, Virginia and West Virginia, it has been expressly held that the statute of limitations is applicable to municipal corporations the same as to private individuals, and that the right to a street may, therefore, be lost by adverse possession.<sup>1</sup> Many, but not all, of the authorities are reviewed in a recent well considered case decided by the Supreme Court of West Virginia,<sup>2</sup> and it is claimed therein that the highest courts of Illinois, Maryland, Massachusetts, Missouri, Mississippi, New York, North Carolina and Texas are also committed to this doctrine; but the facts do not fully justify such a claim. While the Illinois courts have applied the doctrine of estoppel against municipal corporations in several cases, they have expressly held that as to public rights they can not, ordinarily at least, be barred by the statute of limitations.<sup>3</sup> The cases cited from Maryland, Missouri, and North Carolina,<sup>4</sup> are not highway cases and may be distinguished as involving private or contract obligations rather than public rights. In Massachusetts it is held that rights may be acquired upon the presumption arising from lapse of time, that a way has

*Western Lunatic Asylum v. Miller*, 29 W. Va. 326, S. C. 6 Am. St. Rep. 644, May v. School District, 22 Neb. 205, S. C. 3 Am. St. Rep. 266; *Gaines v. Hot Spring Co.*, 39 Ark. 262; *Simplot v. Chicago, etc., R'y Co.*, 16 Fed. Rep. 350; *Mowry v. Providence*, 10 R. I. 52.

<sup>1</sup> *City of Fort Smith v. McKibbin*, 41 Ark. 45, S. C. 48 Am. Rep. 19, S. C. 5 Am. & Eng. Corp. Cas. 453; *Litchfield v. Wilmot*, 2 Root (Conn.), 288; *Beardslee v. French*, 7 Conn. 125; *Black v. O'Hara*, 5 Atl. Rep. 598; *Pella v. Scholte*, 24 Ia. 283; *Burlington v. Railroad Co.*, 41 Ia. 134; *Dudley v. Frankfort*, 12 B. Mon. 610; *Rowan's Exrs. v. Portland*, 8 B. Mon. 232; *Gregory v. Knight*, 50 Mich. 61; Cole-

*man v. Flint, etc., R. R. Co.*, 64 Mich. 160; *City of Cincinnati v. Evans*, 5 Ohio St. 594; *Bowen v. Team*, 6 Rich. 298; *Knight v. Heaton*, 22 Vt. 481; *Levasser v. Washburn*, 11 Gratt. 572; *City of Richmond v. Poe*, 24 Gratt. 149; *Wheeling v. Campbell*, 12 W. Va. 36, S. C. 48 Am. Rep. 24, note

<sup>2</sup> *City of Wheeling v. Campbell*, 12 W. Va. 36.

<sup>3</sup> *Logan Co. v. Lincoln*, 81 Ill. 156; *Alton v. Transportation Co.*, 12 Ill. 38; *Quincy v. Jones*, 76 Ill. 231.

<sup>4</sup> *Kelly's Lessee v. Greenfield*, 2 Har. & McH. 138; *County of St. Charles v. Powell*, 22 Mo. 525; *School Directors v. Goerges*, 50 Mo. 194; *Armstrong v. Dalton*, 4 Dev. L. 568.

been discontinued by competent authority.<sup>1</sup> The latest decisions in Mississippi and New York, instead of lending support to the doctrine approved by the West Virginia court, are among the leading authorities upholding the contrary doctrine.<sup>2</sup> It has been held in Texas that the statute of limitations would run against a city as to its streets,<sup>3</sup> but in a later case the court said that this rule ought not to be extended, and refused to apply it to a county road.<sup>4</sup>

In California, Indiana, Louisiana, Mississippi, New Jersey, New York, Pennsylvania, Rhode Island and Tennessee, it is held that the rights of the public in highways are not barred or lost by the failure of a city to act.<sup>5</sup> In support of the doctrine that the rights of the public may be barred by the statute of limitations, it is said that the local authorities in the exercise of due diligence should prevent all encroachments, and that if they do not, the citizens should take steps to do so, that vigilance

<sup>1</sup> *Holt v. Sargent*, 15 Gray, 97, 101. Compare *Parker v. Framingham*, 8 Metc. 260; *Arundel v. McCulloch*, 10 Mass. 70; *Thomas v. Marshfield*, 13 Pick. 240. In *Henshaw v. Hunting*, 1 Gray, 203, it was held that there could be no adverse possession until the street was ordered to be opened. It seems to us that upon the same reasoning as that adopted in *Henshaw v. Hunting*, it must be held that mere permissive use of a part of a way not needed by the public can not be deemed to destroy the rights of the public.

<sup>2</sup> *City of Vicksburg v. Marshall*, 59 Miss. 563; *Driggs v. Phillips*, 103 N. Y. 77.

<sup>3</sup> *City of Galveston v. Menard*, 23 Tex. 349.

<sup>4</sup> *Coleman v. Thurmond*, 56 Tex. 514, 520. But there can, on principle, be no distinction between county roads and city streets, for in both cases the highways are held by the local organizations as governmental agencies. The truth is, that the ownership of all highways, as highways, is in the State, and it is a departure from principle to apply the

statute of limitations to highways no matter what governmental corporation may have immediate control of them. In the local control of highways we find the State acting through its agents, but never parting with the ultimate control nor with the proprietary right.

<sup>5</sup> *City of Visalia v. Jacob*, 65 Cal. 434, S. C. 6 Am. & Eng. Corp. Cas. 115; *People v. Pope*, 53 Cal. 437; *Sims v. City of Frankfort*, 79 Ind. 446; *Mayor v. Magnon*, 4 Martin (La.), 1; *City of Vicksburg v. Marshall*, 59 Miss. 563; *Cross v. Mayor*, 18 N. J. Eq. 305; *Jersey City v. State*, 30 N. J. L. 521; *St. Vincents' Orphan Asylum v. City of Troy*, 76 N. Y. 108, S. C. 32 Am. Rep. 286; *Walker v. Caywood*, 31 N. Y. 51; *Driggs v. Phillips*, 103 N. Y. 77; *Commonwealth v. McDonald*, 16 Serg. & R. 401; *Com. v. Moorhead* (Pa.), 12 Atl. Rep. 424; *Philadelphia v. Phila., etc., R. R. Co.*, 58 Pa. St. 263; *Simmons v. Cornell*, 1 R. I. 519; *Mayor v. Lenore*, 6 Coldw. 412; *Sims v. Chattanooga*, 2 Lea. 694; *Simplot v. Chicago, etc., Ry. Co.*, 16 Fed. Rep. 350; *Grogan v. Town of Hayward*, 4 Fed. Rep. 161.



should be encouraged, and that the maxim, "*nullum tempus occurrit regi*," applies to sovereignty alone. But it is not so clear that the maxim, "*nullum tempus occurrit regi*," is applicable against the sovereignty alone, and not against governmental subdivisions in matters over which they exercise the powers of sovereignty. Even if this were conceded to be correct, as a general statement, still, it does not necessarily follow that the "common right of highway" can be lost by adverse possession or the failure of the authorities to act. Highways belong to the public, and are peculiarly subject to legislative control, and if the legislature sees fit to exercise its power of control through the agency of a municipal corporation, it is none the less a sovereign power. All that can be said in any event is that it is the sovereign acting through the medium of local instrumentalities. The doctrine that highways can not be lost by adverse possession is supported by other well settled principles of the law. There can be no rightful permanent private possession of a public street. Its obstruction is a nuisance, punishable by indictment.<sup>1</sup> Each day's continuance thereof is an indictable offense, and it follows, therefore, that no right to maintain it can be acquired by prescription.<sup>2</sup> Municipal corporations have no power to alien or dispose of their streets for any purpose inconsistent with their use as highways. It would be a grave reproach to the law to permit a wrong-doer, one who is daily violating the law of the State itself, to take advantage of his own wrong and that of the municipality, and by such indirect and wrongful means obtain a right to the street which the corporation is prohibited from directly granting or destroying. An argument may likewise be drawn from the fact that the interest of the municipality is very different from that of a private individual in his own property. "Individuals may reasonably be held to a limited period to enforce their rights against adverse occupants, because they have interest sufficient to make them vigilant. But in public rights of property, each individual feels but a slight interest, and rather tolerates even a

<sup>1</sup> State v. Berdetta, 73 Ind. 185.

473; Queen v. Brewster, 8 Up. Can. C.

<sup>2</sup> People v. Cunningham, 1 Denio, P. 208; Rhodes v. Whitehead, 27 Tex. 524; Commonwealth v. Upton, 6 Gray, 304; Cross v. Mayor, 18 N. J. Eq. 305.

manifest encroachment than seeks a dispute to set it right."<sup>1</sup> The authorities are, in numbers and weight, nearly equally divided upon this question, but we think the rule best supported by reason is that the "common right of highway" can not be lost by the attempted adverse possession of a private individual.<sup>2</sup>

Even if title to a highway may be acquired by adverse possession, it is not every encroachment thereon that constitutes such possession. Setting out shade trees, making a sidewalk, fencing in a portion of the way, and the like, have been held insufficient to establish a claim by adverse possession.<sup>3</sup>

It has been held that non-user is evidence of abandonment;<sup>4</sup> and some of the courts, influenced, perhaps, by the hardships that would result from a contrary holding in the particular cases under consideration, have applied the doctrine of equitable estoppel where the claimant had made expensive improvements and acquired, or apparently acquired, rights of such a nature and under such circumstances that to deprive him of them seemed highly inequitable and unjust.<sup>5</sup> We doubt, however, if the doctrine of these cases can be sustained upon principle, at least where the city or the local authorities have done no affirmative act to mislead the claimant. It is difficult to conceive upon what principle an equitable estoppel can be securely placed in such cases,

<sup>1</sup> Per Sergeant, J., in *Commonwealth v. Alburger*, 1 Whart. (Pa.) 469.

<sup>2</sup> This, certainly, was the firmly established rule of the common law, and it seems to us that it is such a rule as can be legitimately changed by legislation only, and not by judicial decisions.

<sup>3</sup> *Bliss v. Johnson*, 94 N. Y. 235; *Watkins v. Lynch*, 71 Cal. 21; *Brooks v. Riding*, 46 Ind. 15; *Indianapolis, etc., Co. v. Ross*, 47 Ind. 25; *Cheek v. City of Aurora*, 92 Ind. 107; *Marble v. Price*, 54 Mich. 466. See, also, *Carter v. La Grange*, 60 Tex. 636; *Henshaw v. Hunting*, 1 Gray, 203; *Reilly v. Racine*, 51 Wis. 526; *State v. Culver*, 65 Mo. 607; *Davies v. Huebner*, 45 Ia.

574; *Lee v. Mound Station* (Ill.), 6 W. R. 329.

<sup>4</sup> *Beardslee v. French*, 7 Conn. 125; *Holt v. Sargent*, 15 Gray, 97, 101; *Hillary v. Waller*, 12 Vesey, Jr., 239, 265. And see *Hamilton v. State*, 106 Ind. 361; *Willey v. Norfolk, etc., Co.*, 96 N. C. 408; *Lyle v. Lesia*, 64 Mich. 16, S. C. 7 W. R. 161; *Champlin v. Morgan*, 20 Ill. 181; *Warner v. Holyoke*, 112 Mass. 362.

<sup>5</sup> See *Piatt v. Goodall*, 97 Ill. 84; *Chicago, etc., R. R. Co. v. Elgin*, 91 Ill. 251; *Hamilton v. State*, 106 Ind. 361; *Lane v. Kennedy*, 13 Ohio St. 42, 49; *Big Rapids v. Comstock* (Mich.), 8 W. R. 136; *Simplot v. Chicago, etc., R'y Co.*, 16 Fed. R. 350.

for the person who encroaches upon a public way must know, as a matter of law, that the way belongs to the public, that the local authorities can neither directly nor indirectly alien the way and that they can not divert it to a private use. As the person who uses the highway must possess this knowledge, and in legal contemplation does possess it, one of the chief elements of an estoppel is absent. An estoppel can not exist where the knowledge of both parties is equal and nothing is done by the one to mislead the other. In addition to this consideration may be noted another influential one already suggested in a different connection, and that is, the private use of the public way was wrong in the beginning and wrong each day of its continuance, and it is a strange perversion of principle to declare that one who bases his claim on an original and continued wrong may successfully appeal to equity to sanction and establish such a claim. It is, at all events, a great stretch of the doctrine of estoppel and a wide departure from the rule laid down by the earlier decisions and confirmed by the modern authorities.

Reversion is said to take place when a highway is discontinued or abandoned. Theoretically the fee remains in the owner of the soil as a general rule, and while this is true it is also true that there is a reversion, for the complete dominion reverts to and reverts in the abutting owner. It has been said that while the highway exists there is nothing more than a mere suspension of the abutter's right and that it is not accurate to say that there is a reversion, but as the complete dominion does revert to the owner the term "reversion" is as accurate and convenient as can well be chosen.

The general rule is that upon the discontinuance, vacation, or abandonment of a highway the land covered by it reverts to the owner of the fee.<sup>1</sup> This general rule governs even in cases where a new and different way is substituted for the one abandoned or vacated.<sup>2</sup> As the abutting owner on each side is presumed to own the fee to the center of the street he will generally be entitled to take the land to the center of the street

<sup>1</sup> *Van Amringe v. Barnett*, 8 Bosw. field *v. Williams*, 4 Mass. 427; 2 *Smith's* 372; *Dunham v. Williams*, 36 Barb. Leading Cases (8th Am. ed.), 180; 136, 162; *Heard v. Brooklyn*, 60 N. Y. *Jackson v. Hathway*, 15 Johns. 447. 242; *Harris v. Elliott*, 10 Pet. 26; Fair- <sup>2</sup> *Benham v. Potter*, 52 Conn. 248.

upon its vacation or abandonment.<sup>1</sup> But the general rule may be controlled by the words of the deeds or by the peculiar circumstances of the case, and the abutting owners may not be entitled to any part of the land.<sup>2</sup> We suppose, however, that it would require clear words or some marked peculiarities to take the case out of the operation of the general rule and remove it from the sweep of the presumption that the abutters own to the middle thread of the highway. Under the statutes of Illinois it is held that the reversion is to the original owner and not to the abutter who acquires title after the establishment of the way.<sup>3</sup> The Supreme Court of Kansas, under a very similar statute, asserted a different rule, saying, among other things, that: "Under these circumstances we think it fair to consider that it becomes, as it were, a part of the lot—something in the nature of an accretion to it; and if so, then any conveyance of the lot takes with it that portion of the vacated street."<sup>4</sup> This is a strong assertion of the general rule, but nevertheless a reasonable one, consistent with principle and productive of salutary results.

Where a highway is ordered to be closed and damages are assessed to the owner of the fee the right to the damages is a personal one and does not pass with the land to the grantee.<sup>5</sup> The decision in the case to which we refer is in harmony with the cases which hold that where property is appropriated for a railroad the damages awarded belong to the person who owned the land, and that the right to them does not pass by deed, although the right may be assigned.<sup>6</sup>

<sup>1</sup> *Day v. Schroeder*, 46 Ia. 546; *Burbach v. Schweinler*, 56 Wis. 386, 391; *Banks v. Ogden*, 2 Wall. 57; *Wallace v. Fee*, 50 N. Y. 694; *West Covington v. Freking*, 8 Bush. 121. See note to *Dovaston v. Payne*, 2 Smith's Leading Cases (8th Am. ed.), 177, 178.

<sup>2</sup> *Jackson v. Hathway*, 15 Johns. 447.

<sup>3</sup> *Gebhardt v. Reeves*, 75 Ill. 301. But it is also held that the abutter acquires the land where the abutting lot is conveyed before the acceptance of

the dedication. *Hamilton v. Chicago, etc., Co. (Ill.)*, 15 N. E. R. 854.

<sup>4</sup> *Atchison, etc., Co. v. Patch*, 28 Kan. 470.

<sup>5</sup> *King v. Mayor of New York*, 102 N. Y. 171.

<sup>6</sup> *Schuylkill Navigation Co. v. Decker*, 2 Watts. (Pa.) 343; *McFadden v. Johnson*, 72 Pa. St. 335; *Jones v. Costigan*, 12 Wis. 657; *Indiana, etc., Co. v. Allen*, 100 Ind. 409.



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